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DISSERTATION

From the Outside In

Shaping the International Criminal Court

Brian Rosen

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PREFACE

The nascent International Criminal Court (“ICC”) was created with a noble goal: punish those who commit the world’s worst crimes and deter their future commission. The ICC’s reach, however, extends beyond merely punishing war criminals. It is empowered to find uses of force illegal, to exact punishment on not just illegal but also disfavored uses of force, to declare specific types of weapons or methods of war illegal, and, perhaps, to restrain U.S. military action. In short, it maintains the ability to insert itself into the field most elemental of national power: decisions about whether and how to wage war.

The present study will recommend policy alternatives to military and domestic planning organizations to shape the International Criminal Court (ICC) so that it (1) may prosecute figures who have committed egregious international crimes while (2) being restrained from wrongly overstepping its purpose and authority by improperly intervening in national sovereignty or policy. Specifically, the study will assess current U.S. policy regarding the ICC, discuss the circumstances under which that policy will be ineffectual, discuss policy alternatives, and test the relative effectiveness of other, perhaps more robust, policies against the current U.S. policy. The empirical testing will focus on the extent to which risk to U.S. nationals can be reduced by attempting to influence the process by which judges are elected to the court. More broadly, the study will be an example of applying quantitative analysis to new and evolving areas of national security concern.

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CHAPTER ONE: INTRODUCTION

I. Objectives

The present study will recommend policy alternatives to military and domestic planning organizations to shape the International Criminal Court (ICC) so that it (1) may prosecute figures who have committed egregious international crimes while (2) not overstepping its purpose and authority by improperly intervening in national sovereignty or policy. Specifically, the study will assess current U.S. policy regarding the ICC, discuss the circumstances under which that policy will be ineffectual, present policy alternatives, and test the relative effectiveness of other, perhaps more robust, policies against the current U.S. policy. The empirical testing will focus on the extent to which risk to U.S. nationals can be reduced by attempting to influence the process by which judges are elected to the court. More broadly, the study will be an example of applying quantitative analysis to new and evolving areas of national security concern.

II. Motivation and Background

The ICC can play a valuable role in prosecuting those who commit war crimes, genocide, and crimes against humanity. The United States has an interest in the court fulfilling that role. As such, the United States would want the court's authority and jurisdiction to be sufficiently broad so as to reduce the probability that the court rejects or fails to take on a case that it should.¹ On the other hand, the ICC may become a political body that improperly restrains a nation's power or sovereignty or an extra-national law-making body that makes new, more restrictive law regarding armed conflict. The United States, in particular, has an interest in preventing the court from this sort of overexpansion. As such, the United States would want the court's authority and jurisdiction to be sufficiently constrained so as to reduce the probability of the court accepting a case or rendering a judgment that it should not.² In short, the United States has an interest in an ICC that is sufficiently empowered to take the cases it should,

¹ This is generally referred to as a Type I error.

² This is generally referred to as a Type II error.

thereby reducing the first type of error, but sufficiently restrained from taking the cases it shouldn't, thereby reducing the second type of error.

Complicating this balancing is the reality that a policy that accomplishes one goal tends to hinder the other. A strong ICC will be able to involve itself in areas it should but also will be able to involve itself in areas it should not. The converse is also true. A weak ICC will be less able to overstep its proper role, but also may have difficulty fulfilling that role.

Establishing the proper reach and limits of the court may have been best accomplished *ex ante*, when the rules governing the operations and oversight of the court were drafted and voted upon. However, those rules, in the form of the Rome Statute,³ are already in place. They create a strong court with broad powers that should have little trouble fulfilling the first goal described above, taking the cases it should, but may have difficulty fulfilling the second goal, refraining from taking the cases it should not, in part because many of the court's rules use language too amorphous to determine precisely the bounds of the court's jurisdiction and powers.

It appears that the ICC has the power to exert jurisdiction over U.S. civilian officials and military personnel, to rule that such individuals have committed war crimes, to declare that the mere use of certain types of weapons (such as depleted uranium weapons) constitute a war crime thus rendering their use illegal, and to hold that a U.S. engagement was an illegal use of force despite the U.N. Security Council refusing to do so. The ICC's power to make law could enable it to supersede the Security Council and constrain the United States in ways the Security Council could not. Through its veto power, the United States may prevent the Security Council from rendering an adverse judgment. In contrast, the United States has no direct effect on the rulings of the ICC.

The goal of U.S. policy regarding the ICC is not and should not be to insulate U.S. nationals from liability for having committed criminal acts, but to prevent the ICC from investigating and prosecuting U.S. nationals either because (1) the ICC seeks

³ Rome Statute of the International Criminal Court, U.N. Doc. A/ CONF.183/9 (July 17, 1998) [hereinafter Rome Statute]. The Rome Statute is the treaty that created the ICC and sets forth its operating rules.

prosecutions of U.S. nationals to achieve political goals, for example, to restrain U.S. power or punish the United States for an unpopular use of force, or (2) the court wishes to establish more restrictive laws regulating armed conflict.

The U.S. government's attempts to minimize the effect of the court on U.S. nationals make clear that the U.S. government recognizes the threat the ICC may pose to U.S. interests, but past and current policies have been inadequate to reduce that threat. Through the Department of State, the United States has persuaded states to sign "Article-98 agreements," which are bilateral agreements through which another state agrees to not surrender U.S. nationals to the ICC. The Department of State reports it has concluded over 100 agreements, but the effect of these agreements appears to be negligible. First, no powerful nations and few nations of strategic importance have signed. Second, of those states that have signed agreements, in only about half have the agreements been ratified or otherwise entered into force. Third, of the 100 State Parties to the ICC, only 44 have signed agreements and only 25 of those are in force. In addition, 44 states have publicly refused to sign an agreement. Fourth, the Article-98 agreements may not be enforceable. Thus, states that have signed an Article-98 agreement may not be bound to refrain from cooperating with the ICC. At most, those states may have only deferred deciding whether they will cooperate until some later date. When that date arrives, when the ICC seeks the surrender of a U.S. national, the state may decide that the Article-98 agreement is unenforceable, a decision that may be easier for it to make should the ICC first rule that such agreements are unenforceable, a ruling which the ICC is empowered to issue.

Given the U.S. military's current and likely future activity fighting the global war on terror, it is imperative that the United States institutes an effective, robust strategy that reduces the likelihood that the ICC will exceed its proper role while promoting the court's ability to succeed in its primary mission. Because the court's reach and effect will depend on its jurisdictional and substantive legal judgments interpreting the Rome Statute's text, an effective strategy will depend on the degree to which it successfully causes judges to issue rulings that confine the court to its proper role. This study describes the means by which judges typically may be restrained and how the structure and governing charter of the ICC render those means ineffective, which allows ICC

judges considerable latitude to follow their own policy preferences. Thus, it may be that the only effective way to influence the court's legal judgments is by influencing the compositions of the court's bench. The project will assess this particular strategy and its variations and compare their effectiveness to that of the current policy under various conditions including whether the United States is a party to the ICC.

Most literature on the ICC is advocacy, consisting of arguments as to why the United States should or should not join the court and conclusions about the wisdom or wrong-headedness of the United States having distanced itself from the court. A few studies have taken a more analytical approach, attempting to forecast how the court will act and upon what factors the court's behavior will depend. Although many constitute excellent legal scholarship, all consist of qualitative assessments leading to conclusions largely devoid of measures beyond the conclusions themselves. For example, some papers highlight the opportunities for the court to improperly try a country's nationals as political retribution for that country's unpopular decision to use force and conclude that the ICC is a dangerous threat to state sovereignty.⁴ Other papers highlight the Rome Statute's provisions that attempt to prevent the court from acting improperly and conclude that states have nothing to fear regarding the ICC overstepping its role.⁵

The present study will create measures for evaluating the ICC's behavior (or potential behavior), quantitatively assess the risk that the behavior could permit improper prosecutions or otherwise expand the law in a manner that restrains U.S. power, and test how the United States may affect the court's behavior through attempts to influence the composition of the court.

⁴ E.g., Jimmy Gurule, *United States Opposition to the 1998 Rome Statute Establishing an International Criminal Court: Is the Court's Jurisdiction Truly Complementary to National Criminal Jurisdictions?*, 35 CORNELL INT'L L.J. 1 (2002); Lee A. Casey, *Assessments of the United States Position: The Case Against the International Criminal Court*, 25 FORDHAM INT'L L.J. 840 (2002); John R. Bolton, *The Risks and Weaknesses of the International Criminal Court from America's Perspective*, 64 LAW & CONTEMP. PROBS. 167 (2001); Ruth Wedgwood, *The United States and the International Criminal Court: The Irresolution of Rome*, 64 LAW & CONTEMP. PROBS. 167 (2001).

⁵ E.g., Remigius Chibueze, *United States Objections to the International Criminal Court: A Paradox of "Operation Enduring Freedom"*, 9 ANN. SURV. INT'L & COMP. L. 19 (2003); John Seguin, *Denouncing the International Criminal Court: An Examination of U.S. Objections to the Rome Statute*, 18 B.U. INT'L L.J. 85 (2000); Bartram S. Brown, *U.S. Objections to the Statute of the International Criminal Court: A Brief Response*, 31 INT'L L. & POL. 855 (1999).

Chapter Two details the ICC's reach and power. The Chapter focuses on how the elasticity of the provisions that govern the Court's reach and power, combined with the extensive independence ICC judges enjoy, allow judges sufficient latitude to make new law and policy that accord with their ideology. More narrowly, the Rome Statute empowers judges to issue improper rulings: those that are either politically motivated or make new law governing armed conflict. Chapter Three discusses previous and potential U.S. policies regarding the ICC and hypothesizes that the United States may shape the ICC through the judicial election process. This strategy requires that judicial behavior is sufficiently predictable and that the United States can affect the ICC's judicial composition.

Chapter Four lays out the theoretical basis for empirically assessing judicial behavior and the extent to which judges' rulings can be predicted from their ideology. Chapter Five describes the approach and methods of the study's first of two technical stages: building a predictive model of judicial behavior predominantly based on ideology from U.S. Supreme Court data. Chapter Six presents the refinement of the model and the results showing the extent to which judicial performance can be predicted from ideology. Chapter Seven details the approach and methods of the study's second technical stage: modeling ICC judicial nominations and elections under various uncertainties and U.S. interventions in the process. Chapter Eight discusses the results of this stage and the metric used to evaluate risk to the United States. Chapter Nine presents policy recommendations.

CHAPTER TWO: THE INTERNATIONAL CRIMINAL COURT

This Chapter details the relevant aspects of the ICC. The Chapter focuses on exploring the ICC's reach and power to better understand the types of rulings it could issue, the effect those could have on international law, and whether the court may exceed its proper role and pose a risk to U.S. nationals. The analysis reveals that the combination of the elasticity and ambiguity of the Rome Statute's language and the extensive independence ICC judges enjoy empower judges to expand the law and are bound only by their own sensibilities. The result is that there seems to be little chance that the ICC will be unable to prosecute those who have committed egregious international crimes when those crimes fall within the court's jurisdiction, but there is a great risk that the ICC will overstep its purpose and authority by improperly intervening in national sovereignty or policy. The Chapter then discusses past, current, and potential future attempts to constrain the court so that it successfully accomplishes its goal of prosecuting those who have committed the world's worst crimes without overstepping its proper role.

I. Another Step in the Increasing Judicialization of International Affairs

A. The Growth of International Courts

Recent decades have seen a continual growth in the role of judicial international dispute resolution in international politics. The number, but primarily the prominence, of international courts increased after World War II and have accelerated since the end of the Cold War.⁶ Today, the judgments of international courts reach into most areas of international affairs.

“Now, international courts issue binding decisions that solve multibillion dollar trade disputes between the world's major powers. They enforce the laws of the sea involving matters ranging from seizure of ships to law enforcement searches to the use of seabed resources. They may have been a crucial force behind the integration of Europe into a

⁶ Eric A. Posner & John C. Yoo, *Judicial Independence in International Affairs*, 93 Cal. L. Rev. 1 (2005).

single economic and political unit. International courts even seek to protect the basic human rights of citizens against their own governments and to punish war criminals throughout the world.”⁷

The growing reach and role of international courts has eroded the power of states to control their own affairs. This reality has been both decried as an improper usurpation of state sovereignty and celebrated as bringing greater order and responsibility to the international community.

Henry Kissinger, one of the decriers, noted that “in less than a decade, an unprecedented concept has emerged to submit international politics to judicial procedures. . . . [It] has spread with extraordinary speed and has not been subject to systematic debate.”⁸ Kissinger is not solely concerned with the rapidity and lack of debate surrounding the spread of the judicialization of international politics, for those concerns are merely about process. Kissinger also warns of its effects. This movement “is being pushed to extremes which risk substituting the tyranny of judges for that of governments”⁹ Whatever one feels about the equation of tyranny and government generally, democratic processes ensure that democratic governments are, at least to some extent, responsive to their people, which makes the label “tyranny” somewhat inapplicable. The same cannot be said with respect to international judges.

Among the largest proponents, and indeed instigators, of the growing legalization and adjudication of international politics are international law scholars. They claim that, under certain conditions, international courts can create “global communities of law”¹⁰ and strengthen international relationships.¹¹ Moreover, in contrast to those skeptical of

⁷ *Id.* at 3-4.

⁸ *Id.* at 5 (citing HENRY KISSINGER, DOES AMERICA NEED A FOREIGN POLICY? TOWARD A DIPLOMACY FOR THE 21ST CENTURY 273 (2002)).

⁹ *Id.* Most international relations realists tend to argue that international bodies, courts among them, are irrelevant and any attempt to entrench or enlarge their role is futile. *Id.* at 5 n.11 (citing John J. Mearsheimer, *The False Promise of International Institutions*, 19 INT’L SECURITY 5 (1995); EDWARD HALLETT CARR, *THE TWENTY YEARS’ CRISIS, 1919- 1939* (1962); HANS J. MORGENTHAU, *POLITICS AMONG NATIONS* (1st ed. 1948)). In contrast, Kissinger argues that international courts may have some real, harmful effect.

¹⁰ *Id.* at 5 (quoting Laurence R. Helfer & Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication*, 107 YALE L.J. 273 (1997)).

¹¹ *Id.* at 6.

the benefits of international courts, proponents celebrate courts' ability to restrain nations.

B. A New International Criminal Court

The International Criminal Court ("ICC") promises to take the growing erosion of national power by courts into the field perhaps most elemental of national power: decisions about whether and how to wage war. The divergence of opinion about the ICC mirrors that about international courts generally. One camp worries that the court will be an improper political tool wielded by a collection of lesser powers seeking to restrain powerful nations, primarily the United States, and to punish nations for unpopular uses of force. The other camp believes the court will play a legitimate role of bringing to justice those who commit the world's worst crimes.¹²

The ICC is the first permanent international criminal tribunal. Previous and other current international criminal tribunals were and are *ad hoc*, created by the international community to investigate and prosecute specific heinous international crimes. The original, modern tribunal was established at Nuremburg by the four major powers (France, the Soviet Union, the United Kingdom, and the United States) to prosecute Nazi crimes.¹³ Current *ad hoc* tribunals—the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR)—were established by the Security Council to investigate and prosecute crimes committed during the Yugoslav and Rwandan conflicts, respectively.¹⁴ In contrast, the ICC's jurisdiction is not limited to any specific conflict. As with these tribunals, defendants before the ICC are individuals, not states, which are the parties that come before most international tribunals.

¹² The differing views of the court's proponents and opponents is discussed in greater detail *infra* in the section entitled "Hopes, Fears, and Potential Effects."

¹³ WILLIAM A. SCHABAS, AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT 5 (2001) (citing *Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis, and Establishing the Charter of the International Military Tribunal* (IMT), Annex, 82 UNTS 279 (1951)).

¹⁴ *Id.* at 11.

The Rome Statute¹⁵ is the ICC's founding document. The foundation of the Rome Statute was a draft by the International Law Commission (ILC)¹⁶ as heavily amended by two committees the U.N. General Assembly established to create the statute's final draft.¹⁷ The final negotiations and the statute itself were concluded at Rome in 1998 resulting in the Rome Statute.¹⁸ One hundred and forty-one nations signed the Rome Statute. The ICC came into being on July 1, 2002 when the sixtieth nation became a State Party to the court by submitting its instrument of ratification, acceptance, approval, or accession. To date, there are 100 State Parties.¹⁹ Appendix A displays a table showing which countries have signed the Rome Statute and which countries are State Parties.

The court is mostly independent from any body. There is only a thin link to the Security Council, which can refer a matter to the court for investigation²⁰ and can order the court to defer a prosecution for a 12-month period.²¹ However, there is no external oversight on the court's legal judgments.²²

C. Hopes, Fears, and Potential Effects

Since the Rome Statute was finalized, world leaders, scholars, and other interested individuals have announced their hopes for and fears of the ICC, as well as articulated the Court's potential effects. Kofi Annan summed up the hopes of ICC proponents that the court would "deter future war criminals and bring nearer the day when no ruler, no state, no junta and no army anywhere will be able to abuse human rights with impunity."²³ Chris Patten, the European Union Commissioner for External Relations, sounded similar

¹⁵ Rome Statute, *supra* note 3.

¹⁶ The ILC is a body of legal experts named by the U.N. General Assembly. SCHABAS, *supra* note 13, at 8.

¹⁷ SCHABAS, *supra* note 13, at 8, 13-14 (citing M. Cherif Bassiouni, *Negotiating the Treaty of Rome on the Establishment of an International Criminal Court*, 32 CORNELL INT'L L.J. 443 (1999)).

¹⁸ *Id.* at 15-19.

¹⁹ See *The States Parties to the Rome Statute*, <http://www.icc-cpi.int/asp/statesparties.html> (last visited, February 13, 2006).

²⁰ Rome Statute, *supra* note 3, art. 13(b).

²¹ *Id.* art. 16.

²² The ICC has its own appellate chamber.

²³ Marlise Simons, *Without Fanfare or Cases, International Court Sets Up*, N.Y. TIMES A3 (July 1, 2002).

themes in stating that the court's purpose was to "ensure that genocide and other such crimes against humanity should no longer go unpunished."²⁴ These sentiments have been echoed by many world officials, human rights activists, and international law experts.

Concerns about the ICC's ability to expand the law and intrude upon a state's sovereignty range from the more outlandish, as in the court's potential to override a nation's domestic legislation, such as by prohibiting domestic laws restricting abortion,²⁵ to the more conventional, as in severely constraining a state's ability to use force abroad by progressively expanding the meaning of many of the Rome Statute's proscriptions.²⁶ The latter feared expansion would increase the probability that any military intervention will result in prosecutions by the court, which would likely deter other interventions. U.S. opposition stems from the potential that the United States' "unique international policing responsibilities will expose it to politically motivated prosecutions before an unaccountable court."²⁷

1. The Dual Concerns

The oft-stated fear that the combination of the United States' international role and the ICC's lack of external accountability creates unacceptable risks can be separated into two concerns. The first concern is the exposure to politically motivated prosecutions. This possibility centers on the ability of ICC officials who disagree with a state's decision to use force, a decision over which the court does not yet have

²⁴ Chris Patten, *Why Does America Fear This Court?*, WASH. POST A21 (July 9, 2002).

²⁵ According to one ICC opponent, the Rome statute's prohibitions against enforced pregnancy, "[a]s interpreted by feminists, . . . refer(s) to the condition of any woman denied permission to abort an unborn child. At a private meeting this April during the annual United Nations Commission on Human Rights session in Geneva, Women's Caucus lobbyists explained that they intended to use 'enforced pregnancy' or 'forced pregnancy' in place of abortion in future international negotiations. The reason for the deception: to overcome the resistance among Christian and Muslim nations to international agreements that could override national laws against abortion." Tom McFeely, *Courting Trouble: Ottawa Backs an International Criminal Court At Any Cost*, B.C. REPORT (June 29, 1998), at <http://www.axionet.com/bcreport/web/980629f.html> (last visited February 13, 2006).

²⁶ Jack Goldsmith, *The Self-Defeating International Criminal Court*, 70 U. CHI. L. REV. 89, 96 (2003) (citing Rome Statute, *supra* note 3, arts. 7(1)(e)-(k), 8(2)(b)(xiii)).

²⁷ *Id.* at 95.

oversight,²⁸ to punish the state by indicting that state's nationals for acts arising out of that use of force. Related is the concern of powerful states, such as the United States, that the court will target their nationals so as to appear even-handed or beyond the influence of the powerful states.²⁹ There is some historical precedent for this concern. After multiple requests by Non-Governmental Organizations (NGOs) to investigate the North Atlantic Treaty Organization's (NATO's) conduct in the former Yugoslavia, the ICTY prosecutor empanelled a committee to evaluate accusations of NATO's illegal actions and advise as to whether to open a formal investigation.³⁰ The committee's recommendation against an investigation was derided by the NGOs that had championed the calls.³¹ The creation of the ICTY was supported heavily by NATO. NGOs had little influence over its creation or operations. In contrast, the ICC has been birthed, in part, by NGOs, which had considerable influence over its creation, which heightens concerns about the court acting for the sake of appearances.

Thus, the term "politically motivated prosecutions" describes prosecutions in which ICC officials attempt to prosecute a state's nationals to punish the state for its policy decision to use force or for other politically-based reasons such as to restrain that nation's power.

A second, related concern is the exposure to a more benign variant of politically motivated prosecutions, prosecutions that attempt to criminalize good faith disagreements in military doctrine.³² This concern centers on the ability of ICC officials to try a state's nationals for particular acts of war despite that the law does not clearly proscribe such acts. Such prosecutions are not politically motivated as much as rule-making motivated; they would seek to establish new and firm rules regarding the law of armed conflict. Hereinafter, politically motivated and rule-making motivated prosecutions are collectively referred to as improper prosecutions.

²⁸ The use force may be an act of aggression, over which the ICC will not have jurisdiction until the state parties agree on its definition, a task that has proved vexing both currently and historically. See section entitled, "Aggression."

²⁹ William A. Schabas, *Case Report: Barayagwiza v. Prosecutor*, 94 AM. J. INT'L L. 563 (2000).

³⁰ Schabas, *supra* note 29, at 538.

³¹ *Id.*

³² Ruth Wedgwood, *The Irresolution of Rome*, 64 LAW & CONTEMP. PROBS. 193, 194 (2001).

The nationals of states that have active militaries engaged globally, as the United States does, are particularly susceptible to rule-making prosecutions because (1) the volume of the state's military action provides greater opportunity for the ICC to find cases to use to make new rules regarding the use of force, and (2) laws on the use of force provide few bright-line rules. What acts comply with the requirement that the damage a use of force causes must be proportional to the military advantage anticipated and whether a particular target is civilian or military are hotly debated.³³ Regarding the latter, questions such as whether it is permissible to attack an electrical system that feeds anti-aircraft weapons as well as hospitals or when an enemy's use of a civilian site, such as a school, hospital, or place of worship, renders it a permissible target have few certain answers.³⁴ The United States may be wary of inviting those without military experience, as all ICC judges are and most will be, to review the battlefield decisions of its military personnel, far from the situation and stresses in which those decisions were made, with the effect of (1) subjecting such personnel to criminal sanction if their decisions are found wanting and (2) making new, binding rules on the use of force. Moreover, the United States may be unwilling to allow a court to make international law, as one of the fundamental premises of international law is that, with few exceptions, states are only bound by the laws to which they consent.³⁵

Soon after the Rome conference, the United States expressed the concern that a broad, unrestrained ICC would become a rule-making body whose breadth would distract it and thereby limit its ability to investigate and punish the most serious international crimes.³⁶ Then U.S. State Department spokesman James P. Rubin summarized these concerns.³⁷ Rubin foresaw that the ICC could "be deluged with complaints from well-meaning individuals in organizations that will want the court to address every wrong in

³³ Wedgewood, *supra* note 32, at 194.

³⁴ *Id.*

³⁵ For a discussion of how international law is formed see *infra* section entitled, "Inherent Subjectivity of International Law—The Potential for International Judicial Lawmaking."

³⁶ Marcus R. Mumford, *Building on a Foundation of Sand: A Commentary on the International Criminal Court Treaty Conference*, 8 INT'L L. & PRAC. 151, 199 (1999).

³⁷ James P. Rubin, U.S. Dept. of State Daily Press Briefing (July 20, 1998), at <http://secretary.state.gov/www/briefings/9807/980720db.html> (last visited Dec. 27, 2005).

the world. This will turn the court into a human rights ombudsman and limit its ability to investigate the most serious crimes.”³⁸ In addition, the United States made plain its concern that the Rome Statute’s potential breadth would open the ICC to both “frivolous and politically motivated complaints.”³⁹ In short, the court may be inhibited from effectively acting when and where it should while permitting it to act when and where it should not.

In explaining how the Rome conference produced such a “flawed” Statute, Rubin said that the conference became a “sort of festival . . . for people who didn’t understand the consequences of words.”⁴⁰ That is the benign view. Another view holds that those whose positions won the day in Rome did not want an ICC to be limited merely to the most serious international crimes. They wanted an ICC that would have jurisdiction over any perceived violation of human or civil rights. They wanted a human rights ombudsman.

Similarly, some forecast that the ICC could be used by the middling powers that controlled the agenda in Rome (particularly European nations) to increase their relative influence by restraining militarily powerful nations, the United States chief among them,⁴¹ and speculate that this was one of the goals, if not the primary goal, for creating an ICC.⁴² This is consistent with a practice of middling states, particularly European states, to attempt to use international law to restrain the power of militarily superior states in general and the United States specifically.⁴³ Regardless of the theory’s validity, that is, regardless of the intent of the court’s founders and proponents, the court’s potential restraining effects seem to have been assessed similarly by some of the world’s most powerful and/or most populous nations.⁴⁴ Along with the United States, China, India, Indonesia, Israel, Japan, Pakistan, Russia, and Turkey have declined to ratify the Rome

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ Goldsmith, *supra* note 26, at 100-101.

⁴² *Id.*

⁴³ *Id.* (citing Robert Kagan, Power and Weakness, 113 Pol Rev 3, 11 (June-July 2002)).

⁴⁴ Goldsmith, *supra* note 26, at 101.

Statute.⁴⁵ More generally, the concerns of the court's skeptics center not around what the court's designers intended it to do, but what the court as designed will or could do.⁴⁶

D. U.S. Presidents' Treatment

President Clinton signed the Rome Statute on December 31, 2000, the last day it was open for signature and after his successor had been elected. In doing so, he summed up both the hopes and concerns many harbored regarding the ICC. The President asserted the nation's "strong support . . . for bringing to justice perpetrators of genocide, war crimes, and crimes against humanity" and for "making the ICC an instrument of impartial and effective justice in the years to come."⁴⁷ The President stated his belief that the court "would make a profound contribution in deterring egregious human rights abuses worldwide."⁴⁸ The President also made clear his concerns. He spoke about the Rome Statute's "significant flaws," and how those flaws prevented him from submitting the treaty to the Senate for ratification and should compel his successor to do the same.⁴⁹ President Bush, as President Clinton recommended, never sent the Rome Statute to the Senate. After allowing the signed treaty to languish, he officially made it a dead letter for the United States by informing the United Nations that "the United States does not intend to become a party to the treaty" and "[a]ccordingly, the United States has no legal obligations arising from its signature on December 31, 2000."⁵⁰

⁴⁵ *The States Parties to the Rome Statute*, *supra* note 19.

⁴⁶ For a detailed discussion of the court's potential effects, see *infra* section entitled, "Ambiguity in the Rome Statute's Criminal Provisions."

⁴⁷ Statement on the Rome Treaty on the International Criminal Court, Dec. 31, 2000, 37(1) Weekly Compilation of Presidential Documents 4 (2001).

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ International Criminal Court: Letter to U.N. Secretary General Kofi Annan, State Dept Press Statement (May 6, 2002), *available at* <http://www.state.gov/r/pa/prs/ps/2002/9968.htm> (last visited March 4, 2006).

II. How the Court Initiates a Case

A. The Three Triggers and the Power of the Prosecutor

There are three possible triggers by which a prosecutor can initiate an ICC investigation. First, a State Party refers a matter to the prosecutor.⁵¹ Second, the Security Council refers a matter to the prosecutor.⁵² Third, the Prosecutor, on his own, initiates an investigation based on information received, regardless of the source of the information.⁵³ Any group or individual can charge anyone with a crime and provide purported evidence, no matter how thin or unreliable, to support the charge. The prosecutor is then empowered to evaluate the seriousness of the information, and may collect additional information to do so.⁵⁴

The prosecutor's power to self-initiate an investigation was among the most contentious issues at Rome. Despite the large number of nations, over 160 in total, represented at the Rome Conference, a group of 62 weak and middling powers, called the "like-minded" nations, and a strong coalition of NGOs dominated the proceedings.⁵⁵ The like-minded nations and the NGOs, were committed to some of the more controversial propositions, including an independent prosecutor who could initiate proceedings of his own accord, the absence of a requirement that the Security Council must authorize an investigation, and the denial of reservations to the statute, all of which won approval and were included in the final statute, due in large part to the efforts of the like-minded nations and the NGOs.⁵⁶

⁵¹ *Id.* art. 13(a).

⁵² *Id.* art. 13(b).

⁵³ *Id.* arts. 13(c), 15(1).

⁵⁴ *Id.* art. 15(2).

⁵⁵ *E.g.* SCHABAS, *supra* note 13, at 15 (2001). The following made up the like-minded nations: Andorra, Argentina, Australia, Austria, Belgium, Brunei, Benin, Bosnia-Herzegovina, Bulgaria, Burkina Faso, Burundi, Canada, Chile, Congo (Brazzaville), Costa Rica, Croatia, Czech Republic, Denmark, Egypt, Estonia, Finland, Gabon, Georgia, Germany, Ghana, Greece, Hungary, Ireland, Italy, Jordan, Latvia, Lesotho, Liechtenstein, Lithuania, Luxembourg, Malawi, Malta, Namibia, the Netherlands, New Zealand, Norway, the Philippines, Poland, Portugal, Republic of Korea, Romania, Samoa, Senegal, Sierra Leone, Singapore, Slovakia, Slovenia, Solomon Islands, South Africa, Spain, Swaziland, Sweden, Switzerland, Trinidad and Tobago, United Kingdom, Venezuela and Zambia. *Id.* n.53.

⁵⁶ *Id.* at 15-16.

When the ICC was initially conceived, and in the first draft of the treaty that evolved into the Rome Statute, the prosecutor's powers were to be more limited.⁵⁷ The prosecutor could initiate an investigation only if a matter was referred by the Security Council or a State Party.⁵⁸ A prosecutor could not initiate an investigation at the suggestion of any other party, such as an NGO, or on his own accord. When nations' delegates began debating the terms of the Rome Statute, some argued that the prosecutor should be able to initiate an investigation based on information received from any source, including non-State Parties and NGOs.⁵⁹ NGOs fought for the prosecutor to have this autonomy and the United States fought against it.⁶⁰ The NGOs won; the prosecutor was granted the power to initiate investigations on his own, but an important check on the prosecutor's power was added.

If the prosecutor believes the information he has received provides a reasonable basis to proceed with an investigation, he must gain the approval of a three-judge panel of the Pre-Trial Chamber.⁶¹ The Pre-Trial Chamber can authorize the investigation if it makes two determinations. First, that there is a "reasonable basis" to proceed with the investigation.⁶² Second, that the case "appears to fall within the jurisdiction of the court."⁶³ The decision of the Pre-Trial Chamber may be appealed to the Appellate Chamber.⁶⁴

B. Shifting Power to Judges

This third trigger by which a prosecutor can initiate an investigation most empowers the prosecutor to act politically and seek improper prosecutions. For that reason, it is subject to judicial review. This transfers the power for the ICC to act

⁵⁷ *Draft Statute for the International Criminal Court, Report of the International Law Commission on the Work of its Forty-sixth Session*, UN GAOR, 49th Sess., Supp. No. 10, at 43, UN Doc. A/49/10 (1994), reprinted in [1994] 2 Y.B. Int'l L. Comm'n 46, UN Doc. A/CN.4/Ser.A/1994/Add.1 (Part 2).

⁵⁸ *Id.* arts. 23, 25.

⁵⁹ Allison Marston Danner, *Enhancing the Legitimacy and Accountability of Prosecutorial Discretion at the International Criminal Court*, 97 AM. J. INT'L L. 510, 513 (2003).

⁶⁰ *Id.* at 513-514.

⁶¹ *Id.* art. 15(3).

⁶² *Id.* art. 15(4).

⁶³ *Id.*

⁶⁴ *Id.* art. 82(1)(a).

politically from the hands of the prosecutor, in which it first rests, to the hands of judges. Note, though, that the prosecutor wields the initial power to act politically and seek to expand the law or engage in politically motivated prosecutions. If the prosecutor declines to do so, then it will not happen. The decision will never reach judges. It is only if the prosecutor wields his authority to act, rather than not to act, that the decision is transferred to judges. Thus, the ICC prosecutor has considerable power in deciding the way the court will exert its power, at least the way the court will exert its power unless overruled by judges. For these reasons, choosing a responsible prosecutor and ensuring the prosecutor acts responsibly is of great concern.⁶⁵ This concern, however, is secondary to the concern about judges, for judges oversee, and thus can constrain, a prosecutor who acts improperly, but no one can oversee or constrain judges who act improperly.

The mere authorization of an investigation may have significant consequences. First, it means that both the prosecutor and a panel of judges have ruled that there is a reasonable basis to believe the accused committed criminal acts. If those acts were part of a broader campaign that the state authorized, it may raise the presumption that the state action itself is illegal, a presumption that would likely have political consequences. Second, the prosecutor would then have the power, at least on paper, to compel State Parties, many of whom are U.S. allies, to share information, which may include classified information,⁶⁶ to arrest the accused, to make witnesses available, and generally to assist in the investigation,⁶⁷ all of which would likely create a conflict between the United States and its allies.

III. The ICC's Reach: Requirements of Jurisdiction

The ICC's reach depends on its jurisdiction, which determines who and what cases the court may try. Generally, for a court to adjudicate a matter, the court must have

⁶⁵ See Danner, *supra* note 59.

⁶⁶ The ICC's ability to compel states to produce U.S. classified information is discussed *infra* in this Chapter in the section entitled "Disclosure of Sensitive or Classified Information."

⁶⁷ Rome Statute, *supra* note 3, art. 86 ("States Parties shall, in accordance with the provisions of this Statute, cooperate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court.")

jurisdiction over the parties (personal jurisdiction), in this case the accused, and the subject matter of the case (subject matter jurisdiction). Thus, the court's reach depends on the breadth of its personal and subject matter jurisdiction, which this section details.

A. Personal Jurisdiction—Who the Court May Try

There are five potential bases on which states could exercise jurisdiction over crimes: territory, protection, nationality of accused, nationality of victim, and universality.⁶⁸ Territory is the most common and least controversial. International jurists have often affirmed the right of a state to try and punish people for crimes committed on its territory.⁶⁹ Typically, territorial jurisdiction extends to acts occurring outside a state's territory that directly cause consequences within it.⁷⁰ For example, an order to attack civilians given in one state but carried out in another will be considered to have occurred in both states for purposes of jurisdiction. Jurisdiction based on protection, which is implicated when a state seeks to protect its national interest, and jurisdiction based on the nationality of the victim or accused is less common.⁷¹ Universal jurisdiction, which allows a state to exercise jurisdiction over a matter and try the accused even absent a connection to the victim, accused, or territory in which the crime was committed, is the least common and most controversial. Under customary international law, universal jurisdiction has long been permitted for the crimes of piracy, slavery, and trafficking in women and children. Treaties have expanded that list to include hijacking and other threats to air travel, attacks upon diplomats, nuclear safety, terrorism, Apartheid, and torture.⁷²

The Rome Statute primarily bases the ICC's personal jurisdiction on a combination of territory and nationality.

⁶⁸ SCHABAS, *supra* note 13, at 59 (citing *United States v. Yunis*, 681 F. Supp. 896, 900-1 (D. D.C. 1988) (citing *Harvard Research in International Law, Jurisdiction with Respect to Crime*, 29 AM. J. INT'L L. 435, 445 (Supp.1935))).

⁶⁹ See Schabas, *supra* note 68, at 59-60.

⁷⁰ *Id.* at 60 (citing *United States v. Noriega*, 746 F. Supp. 1506 (S.D. Fla. 1990)).

⁷¹ *Id.* at 60.

⁷² *Id.* (citations omitted).

1. Personal Jurisdiction Based on Territory

The ICC has jurisdiction over any proscribed act committed on the territory of a State Party, irrespective of the nationality of the accused.⁷³ The ICC also has jurisdiction over acts committed on the territory of a non-State Party if that state accepts the ICC's exercise of jurisdiction.⁷⁴ This ad hoc expansion of jurisdiction applies irrespective of the nationality of the accused. Thus, the ICC may exercise jurisdiction over nationals of a state not a party to the ICC, which include U.S. military personnel and civilian officials, to investigate and prosecute acts that occur in a state that is a party to the ICC or in a state that wishes the ICC to investigate the matter. The court's ability to take jurisdiction over nationals of non-State Parties met with some controversy in the negotiations over the Rome Statute. The United States objected vehemently, but many other nations, particularly those of the like-minded group, did not share U.S. concerns.⁷⁵

The ability of non-State Parties to grant the ICC jurisdiction poses a particular risk. Rogue nations, themselves having much to fear from the ICC, will likely not join the court; however, that would not stop them from using the ICC, particularly a potential attacking state's fears of an ICC prosecution, as a shield from an attack. Were the United States to act against a state for reasons similar to that which motivated the action against Libya in 1986, Afghanistan in 1998 or 2001, or Iraq in 2003, or Israel's attack against Iraq in 1981, to take but a few examples, that state could invoke the court's jurisdiction against the United States, and this would be particularly likely if the U.S. intervention did not effectuate a regime change. For example, were the United States or some other nation to attack Iran's growing nuclear capability, Iran could authorize the ICC to investigate the matter.

⁷³ Rome Statute, *supra* note 3, art. 12(2)(a).

⁷⁴ *Id.* art. 12(3).

⁷⁵ The ICC's jurisdiction here is based on the long standing right of a state to exercise jurisdiction over acts that occur in its territory. That long standing right exists with the state, however, and not with some third party such as the ICC. The controversial aspect of the ICC's territorial jurisdiction is that it creates a novel right of a state to delegate its territorial jurisdiction to a third party, the ICC. Goldsmith, *supra* note 26, at 91 n. 10. For a critical view, see Madeline Morris, *High Crimes and Misconceptions: The ICC and Non-State Parties*, 64 L. & CONTEMP. PROBS. 13, 43-47 (2001).

Given the likelihood that most states against which the United States would take hostile military action would not welcome that action, those states would almost certainly assent to the ICC's jurisdiction. Thus, military action taken by the United States would typically fall within the ICC's jurisdiction. The notable exceptions to these scenarios are the combat activities occurring in Iraq. Those are being conducted with the approval of the host states thus making it unlikely that Iraq would authorize ICC jurisdiction over an action. Of course, the government of Iraq that was in power *before* the war likely would have welcomed the ICC investigating the conduct of U.S. military personnel and civilian officials. Because the United States successfully dispatched that government through its military action, the threat of that government authorizing ICC jurisdiction has been removed. This highlights the perverse incentives this jurisdictional provision instills. The United States, and any other nation not a State Party to the ICC, that acts militarily against another state would face less legal peril before the court were it to wage a broader war and overthrow the government of that state than it would were it to conduct some lesser, more limited action, such as that which the United States conducted against Libya in 1986 or against Afghanistan in 1998. Likely, many of the proponents of the court would prefer a limited strike to a general war that overthrows a government but the court's jurisdiction rules incentivizes the latter over the former.

The likelihood of an ICC investigation and the potential of a prosecution is an additional risk and cost to any U.S. intervention, and thus could have a restraining effect on U.S. action. At a minimum, it would almost certainly restrain U.S. action on the margin, just as adding cost to any action has a marginal restraining effect on the action's commission. The degree of restraint on U.S. action will probably correlate, if not be caused by, the extent to which the ICC judges expand the reach of the court, both jurisdictionally and substantively, through their rulings, as expansive rulings increase risk.

2. Personal Jurisdiction Based on Nationality

The ICC can exercise personal jurisdiction over any national of a State Party.⁷⁶ The court also can take jurisdiction over a national of a state that accepts the court's jurisdiction on an *ad hoc* basis.⁷⁷ These would not grant the court jurisdiction over U.S. nationals because the United States is not a party to the ICC nor is it likely to grant the court jurisdiction for purposes of prosecuting a U.S. national.

3. Security Council Referral

The ICC also can exercise jurisdiction over any proscribed act if the Security Council refers the matter to the court, regardless of where the act occurred or the nationality of the accused or victim. While this may seem broad, it is precisely the situation that existed before the creation of the ICC. The Security Council has long been empowered to empanel a court to investigate and prosecute many of the crimes included in the Rome Statute. The ICTY and the ICTR are two current examples of the Security Council exercising this power. Additionally, it likely has no effect on the United States. Were any matter to come before the Security Council involving U.S. nationals, the United States could veto the referral of the matter to the ICC.

4. Summing up Personal Jurisdiction

The ICC will have jurisdiction over an accused if the act (1) was committed on the territory of a State Party (territoriality), (2) was committed on the territory of a non-State Party that assents to the ICC's jurisdiction of the matter (*ad hoc* territoriality), (3) was committed by a national of a State Party (nationality), (4) was committed by a national of a non-State Party that assents to the ICC's jurisdiction of the matter (*ad hoc* nationality), or (5) is referred to the ICC by the Security Council.

For the United States, only possibilities one and two are relevant. The United States does not meet criterion three, as it is not a State Party; would not meet criterion four unless it assented to the court's jurisdiction over a U.S. national; and likely would

⁷⁶ Rome Statute, *supra* note 3, art. 12(2)(b).

⁷⁷ *Id.* art. 12(3).

not meet criterion five, as it almost certainly would veto any referral to the ICC of an act committed by a U.S. national.

B. Subject Matter Jurisdiction—What the Court May Try

For the ICC to hear a case, it must also have jurisdiction over the case's subject matter. The following categories of crimes are within the court's subject matter jurisdiction: genocide, crimes against humanity, war crimes, and aggression.

Aggression, although listed in the Rome Statute as a crime over which the court has jurisdiction, has not yet defined. In contrast, genocide, crimes against humanity, and war crimes each are composed of several individual crimes that are too numerous to discuss individually but are listed in Appendix B. A brief description of each of the four categories follows. Those crimes of particular relevance will be discussed later in this Chapter.

1. Genocide

Genocide is defined as any of several specific acts when “committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group.”⁷⁸ The acts listed are “killing members of the group, causing serious bodily or mental harm to members of the group, deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part, imposing measures intended to prevent births within the group, [and] forcibly transferring children of the group to another group.”⁷⁹

2. Crimes Against Humanity

Crimes against humanity are “any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack.”⁸⁰ The listed acts include but are not limited to murder, enslavement, deportation or forcible transfer of population, torture, rape and other forms

⁷⁸ *Id.* at art. 6.

⁷⁹ *Id.*

⁸⁰ *Id.* art. 7.

of sexual violence, and “other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.”⁸¹

3. War Crimes

War crimes is the most extensive of the crimes within the ICC’s jurisdiction, containing 50 separate criminal acts relating to conduct during armed conflict.⁸² Many are based on and use identical or very similar language as that in previous international conventions, such as the Geneva Conventions of August 12, 1949. Others, though, seem to expand on that language to proscribe acts the conventions did not.⁸³ In addition, unlike genocide and crimes against humanity, which requires a systematic attack directed against civilians, war crimes includes provisions that may proscribe acts conducted without such a malevolent intent.

4. Aggression

The Rome Statute also includes the crime of aggression; however, it has not yet been defined, and thus, currently is outside the court’s jurisdiction.⁸⁴ Once a definition for the crime of aggression is adopted in accordance with the requirements of the Rome Statute, the court shall exercise jurisdiction over it.⁸⁵ However, State Parties may dissent from the definition, and the Court will not be able to exercise jurisdiction over the crime of aggression with respect to dissenting State Parties.⁸⁶ In contrast, the Court will be able to exercise jurisdiction over the crime of aggression with respect to non-State Parties regardless of whether they dissent. In this instance, the Rome Statute binds states that have rejected it more strictly than it binds states that have ratified it, which appears to contravene the fundamental precept of international law that states will only be bound by the laws to which they consent.

⁸¹ *Id.*

⁸² *Id.* art. 8.

⁸³ Relevant individual provisions are discussed *infra* in section entitled, “The ICC’s Power—What the Court May Rule.”

⁸⁴ *Id.* art. 5(2).

⁸⁵ *Id.*

⁸⁶ *Id.* art. 121(5).

Defining aggression suffers from several problems. First, aggression has never been defined in any multilateral treaty.⁸⁷ Second, there does not exist a commonly accepted definition of aggression.⁸⁸ Third, historically, aggression has been considered to be a crime of a state, not of an individual.⁸⁹ Fourth, the crime of aggression equates to finding that there has been an illegal breach of the peace. Under the U.N. Charter, the Security Council has the power to determine whether an act constitutes a breach of the peace, and there may be a reluctance to give that power to the ICC. Depending on the conditions by which the court could take jurisdiction over the crime of aggression, prosecutions could be brought without the Security Council having found that a use of force constituted a breach of the peace. Thus, the ICC could find that the use of military force was an illegal act and a breach of the peace even though the Security Council declined to do so. In the face of these problems, a working group on defining aggression is attempting to find a solution.⁹⁰

⁸⁷ *Report of the International Law Commission on the Work of its Forty-sixth Session, Draft Statute for an International Criminal Court*, U.N. GAOR, 49th Sess., Supp. No. 10, at 72, art. 20(b), U.N. Doc. A/49/10 (1994).

Aggression has been charged at international tribunals in the past, specifically at Nuremberg, but the prosecutors at the time recognized that Germany's actions provided an easy case. Wedgewood, *supra* note 32, at 210 (citing SHELDON GLUECK, *THE NUREMBERG TRIAL AND AGGRESSIVE WAR* (1946)). U.S. Supreme Court Justice Robert Jackson, the chief American prosecutor at Nuremberg, wrote of the difficulties of defining aggression in less clear cases.

In the evolution of the law that it is a criminal offense to plan, incite, or wage a war of aggression . . . [t]here are many theoretical difficulties which cause violent debate but which do not plague us practically in the Nürnberg case at all. These questions might cause considerable trouble in other circumstances. But the evidence at Nürnberg has shown that in this war an aggressive intention was declared by the Nazis--secretly of course--from the very beginning; an intention to get their neighbors' lands without the incumbrance of the neighbors. . . . In not one of these invasions is it claimed that Germany was actually attacked first, or that any one of these countries, with the possible exception of Russia, had the forces to make attack on Germany a serious threat . . . the result is that by any possible definition of aggression, this war was aggressive in its plotting and execution.

Wedgewood, *supra* note 32, at 210 n.67 (quoting GLUECK, *supra* note 87, at viii-ix).

⁸⁸ David Stoelting, *Status Report on the International Criminal Court*, 3 HOFSTRA L. & POL'Y SYMP. 233, 265 (1999).

⁸⁹ *Id.*

⁹⁰ See, Daryl A. Mundis, *Current Development: The Assembly of States Parties and the Institutional Framework of the International Criminal Court*, 97 AM. J. INT'L L. 132 (2003); Silvia A. Fernandez de Gurmendi, *Completing the Work of the Preparatory Commission: The Working Group on Aggression at the Preparatory Commission for the International Criminal Court*, 25 FORDHAM INT'L L.J. 589 (2002).

C. The Effect of Complementarity: What it Means to be “Unwilling or Unable Genuinely . . .”

The Rome Statute purports to allow states that have jurisdiction over a matter to be primarily responsible for adjudicating it by granting the ICC only secondary, or complementary, jurisdiction. The delegates in Rome indicated the importance they believe this principle holds by emphasizing it in the preamble: “The States Parties to this Statute . . . Emphasiz[e] that the International Criminal Court . . . shall be complementary to national criminal jurisdiction.”⁹¹ However, the language they chose to give force to complementarity is sufficiently elastic to allow it to be discarded.

Article 17, the complementarity provision, states that a case is inadmissible to the ICC if it “is being investigated or prosecuted by a State which has jurisdiction over it”⁹² or “[t]he case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned.”⁹³ Potentially, this is a strong limit on the reach of the ICC. It would establish that the ICC merely has a gap-filling role, that it is to act only when no other state does so.

This limiting rule, however, has an exception that has the potential to nullify that limit. If the state investigating or prosecuting the matter is “*unwilling or unable genuinely* to carry out the investigation or prosecution,” the ICC may still adjudicate the matter.⁹⁴ Likewise, if a state with jurisdiction investigated but declined to prosecute because of its *unwillingness or inability genuinely* to prosecute, the ICC may adjudicate the matter.⁹⁵ Most importantly, the ICC is to decide the genuine unwillingness or inability of a state to prosecute. Therefore, the critical issue as to whether a state’s investigation and prosecution, or decision not to prosecute, will preclude the ICC from taking jurisdiction of the case, and thus limiting the ICC’s reach, is whether the *ICC deems* that the state was unwilling or unable genuinely to investigate or prosecute. That

⁹¹ Rome Statute, *supra* note 3, Preamble.

⁹² *Id.* art. 17(1)(a).

⁹³ *Id.* art. 17(1)(b).

⁹⁴ *Id.* art. 17(1)(a) (emphasis added).

⁹⁵ *Id.* art. 17(1)(b) (emphasis added).

makes the ICC the sole arbiter of the applicability of a provision that would limit its power.

The Rome Statute comments on what it means for a state to be *unwilling* or *unable genuinely* to investigate or prosecute, and thus provides some parameters for the meaning of these rather elastic terms. How narrowly it defines them determines the extent to which the complementarity principle can constrain the court.

1. Unwillingness

Under the Rome Statute, “unwillingness” is based on subjective criteria, specifically the state’s purpose or intent of its investigation and prosecution.⁹⁶ A state is considered unwilling when “[t]he proceedings were or are being undertaken or the national decision was made for the *purpose* of shielding the person concerned from criminal responsibility,”⁹⁷ “[t]here has been an unjustified delay in the proceedings which . . . is inconsistent with an *intent* to bring the person concerned to justice,”⁹⁸ or “[t]he proceedings were not or are not being conducted independently or impartially, and they were or are being conducted in a manner which . . . is inconsistent with an *intent* to bring the person concerned to justice.”⁹⁹

As with much of the Rome Statute,¹⁰⁰ the precise meanings of these provisions are unknown, and that is due to both the elasticity of their language and the fact that during the negotiations at Rome, different delegates held widely diverging opinions about the complementarity provisions and, thereby, about the ICC’s power. Some at Rome held a broad view of complementarity, which corresponds to a restrictive view of the role of the ICC. For them, the critical issue was whether the state acted in good faith in

⁹⁶ *Id.* art. 17(2). See Jann K. Kleffner, *The Impact of Complementarity on National Implementation of Substantive International Criminal Law*, 1 J. INT’L CRIM. JUST. 86, 87 (2003).

⁹⁷ Rome Statute, *supra* note 3, art. 17(2)(a) (emphasis added).

⁹⁸ *Id.* art. 17(2)(b) (emphasis added).

⁹⁹ *Id.* art. 17(2)(c) (emphasis added).

¹⁰⁰ For a discussion about the ambiguity of many of the Rome Statute’s substantive provisions, see *supra* section entitled, “Ambiguity in the Rome Statute’s Criminal Provisions.”

investigating and prosecuting or declining to prosecute a case.¹⁰¹ If the state acted in good faith, then it could not be considered unwilling. This view seems to best correspond with the Rome Statute's language. By basing unwillingness on whether the state acts in good faith, it focuses the inquiry, as the Rome Statute provides, on the state's intent or purpose of its action.

Despite the apparent alignment between the Rome Statute's language and the above interpretation, other delegates at Rome argued for other interpretations that are less deferential to a state's exercise of jurisdiction and, thereby, grant more authority to the ICC. One such view that, under some circumstances, grants virtually no deference to a state's exercise of jurisdiction argues that a state should be considered unwilling "when the government that has committed gross human rights violations is still in power."¹⁰² Of course, it will not have been proved that a government, or agents carrying out government policy, committed gross human rights violations until after a trial. Therefore, this condition may reduce to deeming a state unwilling when it (or one of its agents, such as a member of the military) is merely accused of having committed gross human rights violations. Under this construction of the term unwilling, ICC jurisdiction would never be complementary to state jurisdiction when the individual accused of wrongdoing was carrying out state policy. This opens the door to complementarity being nullified for any contested act conducted as part of a broader campaign the legality of which is also contested.

For example, consider the war in Iraq. Some U.S. military personnel involved with the Iraq war have been investigated for violating the law. Some of those investigations concluded with no charges filed because authorities believed the military personnel acted lawfully. Others resulted in arrests and trials. Among those who were tried, some have been convicted and some have been acquitted. In addition, some accuse the United States of committing gross human rights violations in Iraq. Under the above

¹⁰¹ Jared Wessel, *Judicial Policy-Making at the International Criminal Court: An Institutional Guide to Analyzing International Adjudication*, COLUM J. TRANSNAT'L L. (forthcoming) *21 (quoting KRISTINA MISKOWIAK, *THE INTERNATIONAL CRIMINAL COURT: CONSENT, COMPLEMENTARITY AND COOPERATION* 42 (DJOF-Publishing, 2000)).

¹⁰² *Id.* (quoting MISKOWIAK, *supra* note 101, at 42).

construction of unwilling, the United States would be deemed unwilling to genuinely investigate and prosecute the actions of its military personnel. Thus, despite the good-faith investigations and prosecutions the United States conducted, *and despite the convictions the United States obtained*, the United States could be found to be unwilling to genuinely investigate and prosecute its nationals so that complementarity would not bar the ICC from hearing a case against anyone who was investigated but not prosecuted, or investigated, prosecuted, and acquitted.¹⁰³

An even less deferential view of complementarity holds that factual or legal mistakes by a state's courts constitute unwillingness that frees the ICC from the bar of complementarity and allows it to hear a case.¹⁰⁴ Countries, courts, jurists, and legal scholars, among others, frequently disagree on a conclusion about a matter of fact or law. To claim that a court made an error does not make it so. Often, a claimed factual or legal mistake amounts to nothing more than a difference of opinion as to what the facts or law actually are. A construction that equates unwillingness to a claimed mistake of fact or law by a state's tribunal elevates the ICC to be a supreme international court having appellate jurisdiction over any state's judicial system for acts of war. This would turn complementarity on its head. Far from the ICC being complementary to state jurisdiction, it would be supreme, exercising oversight of all states' courts' legal and factual conclusions regarding conduct covered by the Rome Statute's provisions.

An additional, more specific concern for the United States about how to interpret unwillingness for purposes of complementary centers on the process by which the United States investigates and prosecutes military personnel for wrongdoing. Investigations and

¹⁰³ A previous trial would implicate article 20 of the Rome Statute, which prohibits the ICC from trying a person for conduct that formed the basis of crimes for which that person has already been acquitted or convicted. Article 20, however, is subject to exceptions similar to those for complementarity. For example, a prior acquittal or conviction will not bar the ICC from trying a case if "the proceedings in the other court: (a) were for the purpose of shielding the person concerned from criminal responsibility . . . ; or (b) [o]therwise were not conducted independently or impartially in accordance with the norms of due process recognized by international law and were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice." Rome Statute, *supra* note 3, art. 20(3). The similarity of these exceptions to the exceptions of complementarity make it likely that if the exceptions for complementarity apply, the exceptions to the article 20 bar will apply as well.

¹⁰⁴ Wessel, *supra* note 101, at *21 (citing Iain Cameron, *Jurisdiction and Admissibility Issues under the ICC Statute*, in *THE PERMANENT INTERNATIONAL CRIMINAL COURT: LEGAL AND POLICY ISSUES* 86-7, (eds. Dominic McGoldrick et al. 2004)).

prosecutions are conducted by and within the military justice system, which is populated by military personnel. One of the criteria of unwillingness is “proceedings [that] were not or are not being conducted *independently or impartially*.”¹⁰⁵ If the U.S. military investigated and declined to prosecute, or prosecuted and saw acquitted, a member of the military, a judge on the ICC could rule that the U.S. military justice system, although in reality an impartial, adversarial system, is not independent and has but a thin veneer of impartiality, which allows the military to investigate, judge, and ultimately protect itself. Such a ruling would establish that any military investigation or prosecution constitutes U.S. unwillingness that frees the ICC from the restraints of complementarity.

2. Inability

In contrast to unwillingness, inability is defined by more objective criteria, but it too uses elastic language subject to interpretations that greatly restrict the bar of complementarity thereby increasing the reach of the ICC. Article 17(3) provides that a state is unable when “a total or substantial collapse or unavailability of its national judicial system [results in] the State [being] unable to obtain the accused or the necessary evidence and testimony or otherwise [being] unable to carry out its proceedings.”¹⁰⁶ Thus, inability appears to have two criteria: (1) the collapse or unavailability of a state’s justice system, and (2) the consequences of that collapse or unavailability.

These criteria appear quite restrictive, but combining the most elastic portions of article 17(3) produces the following definition of unable: “unavailability of [a state’s] national judicial system [that results in] the State [being] unable to . . . carry out its proceedings.”¹⁰⁷ Thus, a state could be considered unable for purposes of excepting the rule of complementarity whenever the state’s justice system is unavailable to try the case. Such a situation includes when the state lacks domestic laws that proscribe the conduct in

¹⁰⁵ *Id.* art. 17(2)(c) (emphasis added).

¹⁰⁶ *Id.* art. 17(3).

¹⁰⁷ *Id.*

question or even when the state has such laws but interprets the laws differently than the ICC would.¹⁰⁸

The elasticity of the bar of complementarity is significant. ICC proponents frequently cite to complementarity in arguing that the ICC has a narrow jurisdiction and can not override or overrule domestic jurisdiction, and that states, particularly the United States, have nothing to fear from the ICC.¹⁰⁹ Under a narrow interpretation of the complementarity criteria, their arguments may be correct. A broad interpretation, however, produces the opposite result: an ICC that is an international supreme appellate court, with the power to take jurisdiction over any case, even one already tried by a state, by proclaiming state court decisions to be in error or state domestic law to be insufficient. The interpretation that prevails, and thus the extent of the ICC's reach, is solely within the discretion of ICC judges.¹¹⁰ It seems not entirely unreasonable to be suspect of the effect of the constraint of complementarity when its effect is to be interpreted by the entity it is meant to constrain.

IV. The ICC's Power—What the Court May Rule

Whereas jurisdiction determines the court's reach by bounding who and what cases the court may try, the body of relevant law determines the court's power by bounding what rulings the court may issue. If the crimes over which the court has jurisdiction are well-bounded, in part by being precisely defined and limited to the world's most egregious crimes, the court's power is limited. If the crimes over which the court has jurisdiction are not well-bounded because they are loosely defined, the court's power is far greater. In short, the extent of the court's power depends on the crimes over

¹⁰⁸ See Kleffner, *supra* note 96, at 89 & n.11 (citing several sources that support the proposition that inadequacies of a state's domestic law make a state's judicial system unable to try the case for purposes of complementarity).

¹⁰⁹ *E.g.*, Chibueze, *supra* note 5, at 38-42.

¹¹⁰ If a state claims that an ongoing investigation or prosecution renders a case inadmissible before the ICC, then the prosecutor may ask the Pre-Trial Chamber to find that the state is unwilling or unable genuinely to investigate or prosecute the matter. Rome Statute, *supra* note 3, arts. 17(1), 18(2). Whatever the Pre-Trial Chamber's ruling, either side may appeal to the Appellate Chamber. *Id.* art. 82(1)(a). Thus, the Pre-Trial Chamber, and ultimately the Appeal Chamber, will rule on complementarity issues, and in so doing, define the extent to which the court enforces the principle of complementarity.

which the court has jurisdiction and the precision of their definitions. As this section details, many of the Rome Statute's criminal provisions are defined elastically, which enables judges to determine the court's bounds and thus the court's power.

A. The Bases of the Rome Statute's Provisions

Many of the Rome Statute's substantive provisions derive from long-standing treaties. For example, the language of the genocide provisions is copied from the Genocide Convention of 1948, and many of the war crimes provisions are copied from the Geneva Conventions of 1949.¹¹¹ The Rome Statute claims that its other war crimes provisions derive from "the established framework of international law."¹¹² Some do—many of the proscribed acts derive, in some respect, from the Geneva and Hague conventions on the law of war¹¹³—however, several appear to be changed definitions of crimes that had been well established under international law or to be new crimes for which there is no consensus. At a minimum, many of the listed crimes proscribe acts that are not clearly criminal under current international law.¹¹⁴ In addition, as discussed below, using treaty language as the basis of criminal statutes is problematic.

B. Inherent Subjectivity of International Law—The Potential for International Judicial Lawmaking

In theory, international law is based on consent. Nations voluntarily subject themselves to the laws under which they live and, with very rare exceptions,¹¹⁵ nations

¹¹¹ Joshua Bardavid, *The Failure of the State-Centric Model of International Law and the International Criminal Court*, 15 N.Y. INT'L L. REV. 9, 24 (2002) (citing Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, art. VI, 78 U.N.T.S. 277 (entered into force for the United States on Feb. 23, 1989)).

¹¹² *Id.* at art. 8(2)(b).

¹¹³ Mumford, *supra* note 36, at 199.

¹¹⁴ See Panel Discussion: *Association of American Law Schools Panel on the International Criminal Court*, 36 AM. CRIM. L. REV. 223, 233 (1999) (Professor Halberstam arguing that the Rome Statute alters well established definitions of crimes, adds new crimes, and is being used for political purposes).

¹¹⁵ A narrow class of laws called *jus cogens* are norms recognized by the international community as peremptory and they permit no derogation. Vienna Convention on the Law of Treaties, May 23, 1969, art. 53, 1155 U.N.T.S. 332. See also LOUIS HENKIN ET AL., INTERNATIONAL LAW: CASES AND MATERIALS 91-93 (3d ed. 1993) (quoting OPPENHEIM'S INTERNATIONAL LAW 7-8 (Robert D. Jennings & Arthur Watts eds., 9th ed. 1992)). That is, all nations must abide by them regardless of consent. There is no settled list of *jus cogens* but most agree that any list would include the prohibition of genocide, slavery, murder,

are not subject to the laws to which they do not consent. States can register their consent in two ways: signing an international agreement and acting in accord with custom. Thus, treaty law (generally referred to as conventional international law) and custom law (generally referred to as customary international law) are the primary sources of international law.¹¹⁶

In reality though, international judges frequently make law when resolving disputes, even when they purport merely to be stating what the law is based on conventional or customary international law.¹¹⁷ Their actions generally are supported by international law scholars, who view judicial lawmaking as legitimate, if not favored.¹¹⁸ Concerns about international judicial lawmaking parallel those in the domestic context, but domestic judges may be more constrained than international judges due, in part, to domestic courts being one part of a government structure that does not exist in international law.¹¹⁹ On the other hand, strategic constraints on international judges are similar to those on domestic judges, which may cause international judges to wield no greater lawmaking power than domestic judges have.¹²⁰

1. Customary International Law

Judges on the ICC are to interpret the Rome Statute, not customary international law. However, the Rome statute purports to include only those crimes that are already criminal under current treaties or customary international law.¹²¹ Thus, ICC judges will need to interpret customary international law as part of interpreting the Rome Statute.

torture, systemized racial discrimination such as apartheid, piracy, and illegal breach of the peace. *Id.* at 92-93 (quoting OPPENHEIM'S INTERNATIONAL LAW 7-8); RESTATEMENT (THIRD) OF FOREIGN RELATIONS OF THE UNITED STATES § 702 cmt. n. (1987).

¹¹⁶ RESTATEMENT (THIRD) OF FOREIGN RELATIONS OF THE UNITED STATES § 102.

¹¹⁷ Tom Ginsburg, *International Judicial Lawmaking*, 45 VA. J. INT'L L. 631, 632, 639 (2005).

¹¹⁸ *Id.* at 632 (noting that scholars assume the legitimacy of international judicial lawmaking and attempt to increase its effectiveness and coherence).

¹¹⁹ *Id.* at 633 (noting but not sharing those concerns).

¹²⁰ *Id.* at 633-34. ICC judicial independence is discussed in detail *infra* in section entitled "Judicial Independence."

¹²¹ See, e.g., 1 *Preparatory Committee on the Establishment of an International Criminal Court*, U.N. GAOR, 51st Sess., Supp. No. 22, at 16, U.N. Doc. A/51/22 (1996) (noting that customary international law proscribes the listed acts in the Rome Statute), cited in William K. Lietzau, *Checks and Balances and*

Although treaties and customary international law have equal effect, the formation and interpretation of the latter is far more complex than the former. The formation of customary international law requires more than just states following a certain course of conduct (i.e., custom). It also requires that states follow that course of conduct under the belief that such practice is required by law. Thus, customary international law has two distinct elements: (1) the general practice of states and (2) states accept that this general practice is compelled by law, which is referred to as *opinio juris*.¹²² These requirements raise several questions. What constitutes state practice? How much practice is required? How many states are required? Are the practices of every state given the same weight or do they differ in their importance? What type of dissent from the custom is required such that the custom will not bind a dissenting state? While some authoritative writings shed some light on these issues,¹²³ there are few concrete answers beyond the well-settled principle that for customary international law to form there must be a “general and consistent practice of states.”¹²⁴ Thus, the particular

Elements of Proof: Structural Pillars for the International Criminal Court, 32 CORNELL INTN’L L.J. 477, 482 n.25.

¹²² *Id.*

¹²³ For example:

“Practice of states” . . . includes diplomatic acts and instructions as well as public measures and other governmental acts and official statements of policy, whether they are unilateral or undertaken in cooperation with other states . . . Inaction may constitute state practice, as when a state acquiesces in acts of another state that affect its legal rights. The practice necessary to create customary law may be of comparatively short duration, but . . . it must be “general and consistent.” A practice can be general even if it is not universally followed; there is no precise formula to indicate how widespread a practice must be, but it should reflect wide acceptance among the states particularly involved in the relevant activity. Failure of a significant number of important states to adopt a practice can prevent a principle from becoming general customary law though it might become “particular customary law” for the participating states. A principle of customary law is not binding on a state that declares its dissent from the principle during its development.

Id. § 102, cmt. b. See also Michael Byers, *The Shifting Foundations of International Law: A Decade of Forceful Measures against Iraq*, 13 EUR. J. INT’L L. 21 (2002); Anthony D’Amato, *Appraisals of the ICJ’s Decision: Nicaragua v. United States (Merits)*, 81 AM. J. INT’L L. 101 (1987) (explaining the formation of customary international law, particularly how treaties contribute to custom, in critiquing the International Court of Justice’s decision in *Nicaragua v. United States*).

¹²⁴ RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(1)(a), (2) (1987). See also Statute of the International Court of Justice, June 26, 1945, art. 38(1)(b), 59 Stat. 1055, 1060, 3 Bevans 1153, 1187 (“general practice”).

law formed from the several actions of several states is often ambiguous and subject to conflicting interpretations.

When an issue of customary international law arises in a case before an international tribunal, it is left to the judge to declare what the law is. Judges routinely claim that they are merely finding the law—considering state practice to resolve ambiguity and announce the current state of the law—as if they are nothing but guides in a jungle pointing out a hard-to-spot but already laid out path. The truth, though, is that the role of the judge in deciding matters of customary international law is more explorer than guide, as judges often make new law, blaze new paths, in deciding cases.¹²⁵

The new customary international law, because it purportedly is just a statement of what the law is and was before the judge's decision, generally binds all states. Conceivably, a state can be free from this new law by consistently rejecting it, but the burden will be on the rejecting state to do so. A state that remains silent in the face of the newly announced custom may be considered bound by it.¹²⁶ Moreover, in presiding over a case, a judge can rule that a state that is a party to the case has already acceded to the custom that the judge is newly announcing, despite the state's objections to the contrary. Thus, although theoretically states are to be bound by only the laws to which they affirmatively assent either through their signature on a treaty or their purposeful course of conduct, international judges can make new law that will bind states in the absence of their action and in the face of their objection.

In addition, despite the well-settled requirement that customary international law requires a “general and consistent practice of states,”¹²⁷ there has been a discernable pattern in international humanitarian law for judges to devalue, if not disregard, state practice in ruling on whether a principle is customary international law. Theodor Meron, former President and current judge of the ICTY wrote about this growing practice almost two decades ago.

¹²⁵ Ginsburg, *supra* note 117, at 639-40.

¹²⁶ *Id.*

¹²⁷ See *supra* note 124 and accompanying text.

Only a few international judicial decisions discuss the customary law nature of international humanitarian law instruments. These decisions nevertheless point to certain trends in this area, including a tendency to ignore, for the most part, the availability of evidence of state practice (scant as it may have been) and to assume that noble humanitarian principles that deserve recognition as the positive law of the international community have in fact been recognized as such by states. The "ought" merges with the "is," the *lex ferenda* with the *lex lata*. The teleological desire to solidify the humanizing content of the humanitarian norms clearly affects the judicial attitudes underlying the "legislative" character of the judicial process. Given the scarcity of actual practice, it may well be that, in reality, tribunals have been guided, and are likely to continue to be guided, by the degree of offensiveness of certain acts to human dignity; the more heinous the act, the more the tribunal will assume that it violates not only a moral principle of humanity but also a positive norm of customary law.¹²⁸

Meron describes a drastic and significant shift in a fundamental precept of customary international law. According to this view, no longer is a custom required for customary international law to form. Instead, in deciding whether a principle has attained the character of customary international law, what judges believe the law ought to be shall govern, not what the custom actually is. The more offensive judges find the behavior to be, the more likely they are to disregard how states act and give superior weight to how judges believe states *should* act.

The intervening decades have seen the growth and implementation of this interpretation of customary international law's formation. It appears the ICTY is a devotee as it repeatedly has found a principle to have become customary international law despite the absence of a custom. For example, in the Kupreskic Trial Judgment, the Trial Chamber, in announcing new customary international law, stated that, "[P]rinciples of international humanitarian law may emerge through a customary process under the pressure of the demands of humanity or the dictates of public conscience, *even where*

¹²⁸ Theodor Meron, *The Geneva Conventions as Customary Law*, 81 AM. J. INT'L L. 348, 361 (1987).

State practice is scant or inconsistent.”¹²⁹ Even were it proper, as a matter of law, for a court to find a new principle of customary international law based on the “pressure of the demands of humanity or the dictates of public conscience,” courts are supposed to be institutions in which judgments are based on evidence. Evidence of things as intangible as the “pressure of the demands of humanity or the dictates of public conscience” are not obtained easily. For example, how are judges to measure the pressure of the demands of humanity? One surmises that a lack of evidence will be no barrier to the formation of customary international law, as judges’ beliefs about these intangible, immeasurable factors will control. A firm belief by a judge that a principle should be customary international law likely will serve as self-evident evidence of the demands of humanity, and thus suffice in the absence of state action or even in the presence of state action to the contrary.

A complete recitation of the extent to which the *ad hoc* ICTs, the ICTY and the ICTR, have progressively expanded the law is beyond the scope of this study, but an additional example from the ICTY is instructive. Crimes against humanity can be committed only against a civilian population. *Prosecutor v. Tadic* required the court to decide whether being members of a resistance movement precludes people from being considered part of the civilian population and thus victims of crimes against humanity.¹³⁰ Despite that the labels civilian and belligerent had always been considered mutually exclusive in international law, the court held that “the presence of those actively involved in the conflict should not prevent the characterization of a population as civilian and those actively involved in a resistance movement can qualify as victims of crimes against

¹²⁹ *Prosecutor v. Kupreskic*, Case No. IT-95-16-T, ¶ 527 (Int’l Crim. Trib. for Former Yugoslavia Trial Chamber II Jan. 14, 2000) (emphasis added), available at <http://www.un.org/icty/kupreskic/trialc2/judgement/kup-tj000114e.pdf> (last visited Jan. 7, 2006). For another example of the ICTY finding a new principle of customary international law despite the absence of a custom, see *Prosecutor v. Tadic*, Case No. IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (Int’l Crim. Trib. for Former Yugoslavia Appeals Chamber Oct. 2, 1995), available at <http://www.un.org/icty/tadic/appeal/decision-e/51002.htm> (last visited Jan. 7, 2006). Judge Meron discusses this case, and the general trend of judges announcing new customary law without the existence of a custom in Theodor Meron, *The Continuing Role of Custom in the Formation of International Humanitarian Law*, 90 AM. J. INT’L L. 238 (1996).

¹³⁰ *Prosecutor v. Duko Tadic a/k/a “Dule”*, IT-94-1, Opinion and Judgment, ¶¶ 635-643 (May 7, 1997) [hereinafter “*Prosecutor v. Tadic*”], available at <http://www.un.org/icty/tadic/trialc2/judgement/tad-tsj70507JT2-e.pdf> (last visited November 21, 2005).

humanity.”¹³¹ Thus, the court made new law by expanding the definition of civilian population and thereby greatly expanded the reach of the offense.

2. Conventional International Law

Treaties also leave room for judicial policymaking, as they often use ambiguous language purposely so that different states may hold different beliefs about the rights and obligations a treaty grants and imposes. The ambiguous, elastic language is necessary to achieve agreement on a treaty while papering over the lack of shared intent about what the states are actually agreeing to.¹³² Elastic language is the tool states use to erase, or at least ignore, their substantively different positions.¹³³ Historically, this practice has worked well, primarily because, for most treaties, states interpret the treaty for themselves and no outside body checks, or overrides, a state’s interpretation. For those treaties that are at issue in an international tribunal though, the elasticity of its language grants judges greater opportunities for judicial lawmaking.

In contrast to treaties, criminal statutes are generally drafted with precision and include little ambiguity. Crimes must be clearly stated so as to remove doubt about what actions the law deems criminal. The rationale is simple: individuals should not be placed in jeopardy of confinement based on statutes that fail to make clear what actions the law proscribes.¹³⁴

The Rome Statute, a treaty codifying certain crimes, brings together the incompatible nature of treaties, which require ambiguity, and criminal statutes, which require specificity. Both requirements cannot be met simultaneously, and in the Rome Statute, specificity was sacrificed for ambiguity and the broader agreement ambiguity achieves.

¹³¹ *Id.* ¶ 643.

¹³² Lietzau, *supra* note 121, at 484, 487.

¹³³ *Id.*

¹³⁴ *See* United States v. Lanier, 520 U.S. 259, 266 (1997).

3. Judicial decisions as a Source of Law

The international legal system views the rulings of tribunals less authoritatively than does the domestic legal system. The rules and principles espoused by an American court in reaching its decision become binding precedent in its jurisdiction. In short, these rules and principles become the law.

In the international legal system, court opinions are supposed to be viewed as evidence of what the law is, but the rules they state are not formally considered to be law.¹³⁵ Separate from the role that judicial opinions are supposed to play in the international law is the role they actually play. International tribunals often cite to and attempt to follow previous decisions, even those rendered by other tribunals.¹³⁶ For example, in rendering a decision, the Permanent Court of International Justice stated that it had “no reason to depart from a construction which clearly flows from the previous judgments the reasoning of which it still regards as sound.”¹³⁷ More generally, judicial opinions resolving matters of international law are accorded substantial weight, with the specific degree of weight often depending on several factors, including the unanimity of the tribunal and the political contentiousness of the underlying issue.¹³⁸ The respect that international legal scholars and jurists accord to judicial opinions suggest that they carry the force of precedent practically if not formally.¹³⁹ This practice is formalized in the Rome Statute through article 21(2), which permits the court to apply principles and rules it has established in prior decisions.¹⁴⁰ Thus, the Rome Statute formally grants ICC

¹³⁵ RESTATEMENT (THIRD) OF FOREIGN RELATIONS OF THE UNITED STATES § 103; *See also*, HENKIN ET AL., *supra* note 115 at, 10, 119-23.

¹³⁶ Ginsburg, *supra* note 117, at 638-39 (citing MOHAMED SHAHABUDDEEN, PRECEDENT IN THE WORLD COURT 232 (1996)).

¹³⁷ Readaptation of the Mavrommatis Jerusalem Concessions, Jurisdiction, 1927 PCIJ Reports Series A, No. 11, at 18, *quoted in* Ginsburg, *supra* note 117, at 638 & n.28.

¹³⁸ In commenting on the weight given to decisions of the International Court of Justice, one scholar noted that such decisions are “generally accepted as the ‘imprimatur of jural quality’ when the Court speaks with one voice or with the support of most judges. However judgments and advisory opinions by a significantly divided court have diminished authority. This is especially true when the issues are perceived as highly political and the judges seem to reflect the positions of the states from which they come.” *See* HENKIN ET AL., *supra* note 115, at 120.

¹³⁹ Ginsburg, *supra* note 117, at 638-39.

¹⁴⁰ Rome Statute, *supra* note 3, art. 21(2).

decisions the weight of law, whereas most tribunals' decisions have that character only *de facto*.

C. Ambiguity in the Rome Statute's Criminal Provisions

The ambiguity in the Rome Statute's criminal provisions provide sufficient latitude for judges to engage in substantial judicial policymaking. Many of the offenses in the Rome Statute are not clearly defined, likely because they use the same or substantially similar language as law of war and humanitarian law treaties from which they derive, and, as discussed previously, treaties typically purposely use ambiguous language.¹⁴¹ According to an informal poll by a member of the U.S. delegation at the Rome conference, many of the war crimes provisions, which derive from treaties, "were neither widely understood nor consistently defined among the law of war experts negotiating in Rome."¹⁴² Moreover, when the Rome Statute was drafted and adopted, the imprecision of its language was well known.¹⁴³ For example, "[t]he meaning of 'imperatively demanded by the necessities of war'¹⁴⁴ has evaded agreement for years. Similarly, 'buildings which are undefended'¹⁴⁵ has been subject to several national definitions. The difference between 'poison'¹⁴⁶ and 'poisonous or other gases, and all analogous liquids, materials or devices,'¹⁴⁷ or between 'biological experiments'¹⁴⁸ and 'medical or scientific experiments'¹⁴⁹ is not widely recognized."¹⁵⁰

¹⁴¹ See *supra* notes 132 to 133 and accompanying text.

¹⁴² Lietzau, *supra* note 121, at 480 n.14.

¹⁴³ *Id.*

¹⁴⁴ Rome Statute, *supra* note 3 art. 8(2)(b)(xiii). Article 8(2)(b)(xiii) prohibits, "Destroying or seizing the enemy's property unless such destruction or seizure be imperatively demanded by the necessities of war." *Id.*

¹⁴⁵ *Id.* art. 8(2)(b)(v). Article 8(2)(b)(v) prohibits, "Attacking or bombarding, by whatever means, towns, villages, dwellings or buildings which are undefended and which are not military objectives." *Id.*

¹⁴⁶ *Id.* art. 8(2)(b)(xvii). Article 8(2)(b)(xvii) prohibits, "Employing poison or poisoned weapons." *Id.*

¹⁴⁷ *Id.* art. 8(2)(b)(xviii). Article 8(2)(b)(xviii) prohibits, "Employing asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices." *Id.*

¹⁴⁸ *Id.* art. 8(2)(a)(ii). Article 8(2)(a)(ii) prohibits, "Torture or inhuman treatment, including biological experiments," against protected persons under the Geneva Convention. *Id.*

¹⁴⁹ *Id.* art. 8(2)(b)(x). Article 8(2)(b)(x) prohibits, "Subjecting persons who are in the power of an adverse party to physical mutilation or to medical or scientific experiments of any kind which are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his or her interest, and which cause death to or seriously endanger the health of such person or persons." *Id.*

¹⁵⁰ *Id.* at 480 n.14 (citations omitted).

More generally, some of the provisions create substantial doubt about precisely what conduct they proscribe. This study does not attempt a complete recitation of the ambiguity of the Rome Statute's provisions; however, some examples are analyzed, particularly those that allow for the most wide-ranging judicial policy-making.

1. “Wilfully Causing Great Suffering, or Serious Injury to Body or Health”

Article 8(2)(a)(iii) prohibits, “Wilfully causing great suffering, or serious injury to body or health” to persons protected under the Geneva Convention.¹⁵¹ The ambiguity inherent in this provision has two sources. First, it departs from typical criminal statutes in that few are based *solely* on the outcome of conduct.¹⁵² Most prohibit people from taking some specific action that has certain consequences. This provision, however, prohibits *all* willful conduct that causes the prohibited outcome, “great suffering or serious injury to body or health.” Second, there is no guidance on what is meant by “great suffering” or “serious injury.” These terms are so elastic that they could accurately describe most activity that occurs during any conflict, for great suffering and serious injury, even among protected persons under the Geneva Conventions, is a common, anticipated result of war.¹⁵³ Even the negotiators sent to draft the ICC's rules of evidence and elements of crimes, who initially claimed that law of war principles would provide substantial guidelines, could not sufficiently identify the nature of the offense.¹⁵⁴

2. The Rome Statute's Proportionality Provision

The Rome Statute's proportionality provision provides perhaps the most extensive opportunities for judicial policymaking and for the ICC to expand its power. Article 8(2)(b)(iv) is the Rome Statute's version of the customary international law's proportionality rule, which mandates that the damage caused by any use of force must be

¹⁵¹ Rome Statute, *supra* note 3, art. 8(2)(a)(iii).

¹⁵² Lietzau, *supra* note 121, at 483.

¹⁵³ *Id.*

¹⁵⁴ *Id.*

proportional to the military advantage expected to be gained. Specifically, article 8(2)(b)(iv) lists as a war crime “Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated.”¹⁵⁵

Encompassed in this one offense are four separate offenses, each of which differs from the others only by the type of harm the attack causes: loss of civilian life, injury to civilians, damage to civilian objects, and environmental damage.¹⁵⁶ The first offense is “Intentionally launching an attack in the knowledge that such attack will cause *incidental loss of life . . . to civilians* which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated.”¹⁵⁷ The second is “Intentionally launching an attack in the knowledge that such attack will cause incidental . . . *injury to civilians . . .* which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated.”¹⁵⁸ The third is “Intentionally launching an attack in the knowledge that such attack will cause incidental . . . *damage to civilian objects . . .* which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated.”¹⁵⁹ The fourth is “Intentionally launching an attack in the knowledge that such attack will cause incidental . . . *widespread, long-term and severe damage to the natural environment* which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated.”¹⁶⁰

Because all four offences suffer from the same problems and ambiguities and they collectively refer to damage to civilians, civilian objects, and the environment, for the sake of brevity, the analysis will refer to them collectively. Thus, the offence collectively proscribes intentionally launching an attack in the knowledge that such attack will cause

¹⁵⁵ Rome Statute, *supra* note 3 art. 8(2)(b)(iv).

¹⁵⁶ The construction of the four crimes assumes that “incidental” modifies each of the four harms. This appears to be a proper interpretation of the provision, however, it may permit other constructions.

¹⁵⁷ Rome Statute, *supra* note 3, art. 8(2)(b)(iv) (emphasis added).

¹⁵⁸ *Id.* (emphasis added).

¹⁵⁹ *Id.* (emphasis added).

¹⁶⁰ *Id.* (emphasis added).

incidental damage to civilians, civilian objects, and the environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated.¹⁶¹

In any armed conflict, a great number of attacks will be intentionally launched with knowledge that the attack will cause incidental damage to civilians, civilian objects, and the environment. Whether such attacks are criminal depends on the second part of the offense, which requires the resultant damage be “clearly excessive in relation to the concrete and direct overall military advantage anticipated.”¹⁶² This raises two questions. First, what does it mean for damage to be “clearly excessive” in relation to the military advantage anticipated? Rendering such a conclusion requires three things: assessing *a priori* the degree of damage the attack would cause, assessing the degree of military advantage anticipated by the attack, and making the value judgment that the former does not merely exceed the latter, but *clearly* exceeds the latter.

Such a judgment is inherently subjective, which leads to the second question: by what or whose standard is this judgment to be made? The answer appears to turn on what portion of the provision the word “knowledge” modifies. The offense proscribes launching an attack in the knowledge that it will (1) cause civilian or environmental damage which (2) would be clearly excessive. Thus, the question is whether a violation of the provision requires the defendant to have knowledge of only (1), or of both (1) and (2). That is, to commit the offense, must the defendant know only (1) the amount of civilian or environmental damage the attack would cause, or must he also believe (2) that the amount of damage would be clearly excessive? The distinction partially determines the degree of judicial discretion the provision permits.

Under the second interpretation, to commit the offence, a defendant must launch the attack knowing (1) the attack would cause some degree of civilian damage, and (2) that degree of damage would be clearly excessive in relation to the military advantage anticipated. A defendant who launched an attack that actually caused civilian damage that was clearly excessive in relation to the military advantage anticipated would not be

¹⁶¹ *Id.*

¹⁶² *Id.*

criminally liable if the defendant did not know that would result when he launched the attack. This would occur if the defendant honestly albeit mistakenly believed that the civilian damage would not be clearly excessive in relation to the military necessity anticipated, either because the defendant (1) mistakenly underestimated the extent of the civilian damage that would occur, or (2) knew the extent of the damage but judged it not to be clearly excessive in relation to the military necessity anticipated. The second component is the more important one. It bases a defendant's culpability entirely on his own value judgment, his own *a priori* subjective determination that the damage would not be clearly excessive.¹⁶³ If the defendant valued the civilian damage as not being of a clearly excessive character, he has not committed the offense.¹⁶⁴ The court's evaluation of the defendant's value judgment as to the excessive character of the death would be irrelevant.¹⁶⁵

A different interpretation of the knowledge the offense requires holds only that a defendant knows the extent of the damage that would result from an attack. Whether the extent of the damage was clearly excessive in relation to anticipated military necessity would be a legal issue the court would decide. Thus, a defendant would not be criminally liable if the defendant acted under a mistaken belief that the civilian damage resulting from an attack would be less extensive than it turned out to be. However, a mistaken belief about whether the civilian damage was "clearly excessive" would not preclude criminal liability. Under this interpretation, the court's value judgment—and more to the point, the value judgment of individual ICC judges—as to the excessive character of the attack, and not the defendant's value judgment, controls liability.

Comparing these two interpretations of the knowledge requirement, the former conditions liability on the defendant's value judgment, thereby mostly foreclosing the opportunity for judicial policymaking. The latter interpretation conditions liability on

¹⁶³ Michael Bothe, *War Crimes*, in 1 THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY 379, 400 (Cassese et al. eds. 2002).

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

judges' value judgments, thereby inviting judicial policymaking. The Rome Statute gives no indication or guidance as to which interpretation is correct.¹⁶⁶

An additional problem in interpreting this provision applies solely to the environmental component. That provision refers to “*widespread, long-term and severe damage to the natural environment.*”¹⁶⁷ In 1999, a committee commissioned by the ICTY prosecutor to evaluate prosecuting the U.S. and NATO officials for war crimes noted the difficulty of interpreting this language when it considered a similar provision in the Additional Protocol I to the Geneva Convention.¹⁶⁸ That provision states, “It is prohibited to employ methods or means of warfare which are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment.”¹⁶⁹ Neither the United States nor France is a party to Additional Protocol I. In addition, the United States has repeatedly rejected that its provisions constitute customary international law as applied to the United States.¹⁷⁰ Nonetheless, the committee held that the provisions may have become customary international law that binds the United States and analyzed whether NATO had violated them. In their evaluation, the committee stated, “It is difficult to assess the relative values to be assigned to the military advantage gained and harm to the natural environment, and the application of the principle of proportionality is more easily stated than applied in practice. . . . The critical question is what kind of environmental damage can be

¹⁶⁶ This uncertainty is analyzed further *infra* in section entitled, “Effect of the Elements of Crimes.”

¹⁶⁷ Rome Statute, *supra* note 3, art. 8(2)(b)(iv) (emphasis added).

¹⁶⁸ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), adopted June 8, 1977, art. 35(3), 1125 U.N.T.S. 3 [hereinafter Additional Protocol I].

¹⁶⁹ *Id.*

¹⁷⁰ “The U.S. specifically objects to article . . . 35(3).” INTERNATIONAL AND OPERATIONAL LAW DEPARTMENT (THE JUDGE ADVOCATE GENERAL’S SCHOOL), OPERATIONAL LAW HANDBOOK (2002) 11 (Jeanne M. Meyer & Brian J. Bill, eds., 2002), *available at* <https://www.jagcnet.army.mil/JAGCNETInternet/Hompages/AC/CLAMO-Public.nsf/0/1af4860452f962c085256a490049856f?OpenDocument&TableRow=4.2#4> (last visited Feb. 15, 2006). *See also* Michael Matheson, *The United States Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Conventions, Remarks before Session One of the Humanitarian Law Conference* (Fall 1987), 2 AM. U. J. INT’L L. & POL’Y 419, 424 (1987) (stating that Article 35(3) is “too broad and ambiguous and is not a part of customary law”).

For a discussion on the formation of customary international law, see *supra* section entitled “Customary International Law.”

considered to be excessive. Unfortunately, the customary rule of proportionality does not include any concrete guidelines to this effect.”¹⁷¹ The ambiguity of the similar provision in the Rome Statute allows ICC judges considerable latitude to make law and expand the power of the ICC.

3. Using the Proportionality Provision to Proscribe Weapons and Methods

The latitude the proportionality provision extends to judges allows them to proscribe certain types of weapons, such as depleted uranium (DU) weapons, or methods, such as destruction of dual-use infrastructure like power plants and bridges or discharging weapons despite the presence of unwilling human shields. The ICC could rule that these weapons or methods cause civilian losses or environmental damage too severe to ever be justified by military necessity or that the losses could be justified only by the most extreme case of military necessity, such as catastrophic damage to the state in the face of an imminent attack. Such decisions would make whole classes of weapons or methods illegal except in the direst circumstances. A review of all the potential rulings the court could issue is not practicable, but this section briefly reviews the potential for the court to issue one specific ruling, that DU weapons cause too much civilian damage to permit their general use (outside of specific, dire circumstances).

As an indication of how the law may progress in this area, consider the analysis of the ICTY prosecutor’s committee that reviewed NATO’s conduct of the war in the former Yugoslavia. The prosecutor received “numerous requests that she investigate allegations that senior political and military figures from NATO countries committed serious violations of international humanitarian law during the campaign.”¹⁷² Among them were complaints about NATO’s use of DU weapons. The committee found that there was no treaty ban on the use of these weapons, nor did customary international law proscribe their use, but “there is a developing scientific debate and concern expressed

¹⁷¹ Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia ¶¶ 19-20, *available at* <http://www.un.org/icty/pressreal/nato061300.htm> (last visited Feb. 15, 2006) [hereinafter NATO Prosecution Report].

¹⁷² NATO Prosecution Report, *supra* note 171, at ¶ 1.

regarding the impact of the use of [DU] projectiles,” and that customary international may progress in the future so as to ban DU weapons.¹⁷³

Moreover, the context within which these decisions were made is significant. The U.S.-led NATO campaign against Serbia had two positive attributes that should have limited if not forestalled legal recriminations against the United States. One, operations were conducted multilaterally by NATO and were welcomed by much of the international community. Two, the purpose of the military campaign was unquestionably humanitarian: to stop ongoing and threatened genocide and ethnic cleansing of Kosovar Albanians. In addition, the ICTY was a creation of the Security Council and was supported heavily by NATO. Given this context, it is not surprising that the prosecutor declined to initiate prosecutions that would have required expanding the law to gain convictions. A prosecutor and judges in a different context could decide that the same actions constituted war crimes. This would be especially so when the legality of the intervention itself is debated, provided that legal determinations about particular acts of war can be affected by the legality of resorting to war. Thus, another uncertainty is presented: the extent to which legal conclusions about specific military action depend on the legality of the underlying conflict.

There are indications of the law’s progression regarding DU weapons. One indication is the extent to which the Prosecutor’s decision not to prosecute NATO was has been criticized by international law scholars.¹⁷⁴ Another is a vote in the General Assembly. On October 25, 2002, Iraq proposed a resolution in the General Assembly that essentially asserted that DU munitions are a health hazard and implied that they

¹⁷³ *Id.* ¶ 26.

¹⁷⁴ Dr. Kerem Altıparmak, *Bankovic: An Obstacle to the Application of the European Convention on Human Rights in Iraq?*, 9 J. CONFLICT & SECURITY L. 213, 217 n.15 (2004) (citing W. J. Fenrick, *Targeting and Proportionality during the NATO Bombing Campaign against Yugoslavia*, 12 EUR. J. INT’L L. 489 (2001); Andreas Laursen, *NATO, the War over Kosovo, and the ICTY Investigation*, 17 AM. U. INT’L L. REV. 765 (2002); P. Benvenuti, *The ICTY Prosecutor and the Review of the NATO Bombing Campaign against the Federal Republic of Yugoslavia*, 12 EUR. J. INT’L L. 503 (2001); M. Bothe, *The Protection of the Civilian Population and NATO Bombing on Yugoslavia: Comments on a Report to the Prosecutor of the ICTY*, 12 EUR. J. INT’L L. 531 (2001); Natalino Ronzitti, *Is the non liquet of the Final Report by the Committee Established to Review the NATO Bombing Against the FRY Acceptable?*, 840 INT’L REV. RED CROSS 1017 (2000), available at http://www.icrc.org/Web/Eng/siteeng0.nsf/htmlall/57JQTC?OpenDocument&View=defaultBody&style=custo_print (last visited Feb. 15, 2006)).

constitute weapons of mass destruction.¹⁷⁵ The resolution was defeated by 35 to 59 with 56 abstentions after heavy lobbying by the United States.¹⁷⁶ Given the context, a proposal submitted by Iraq about weapons the U.S. employs during the fervency of the debate about whether there would or should be a war against Iraq, the closeness of the vote and the number of abstentions portends a growing desire on the part of many countries to outlaw those weapons. Another data point indicating that growing desire is the European Parliament's call for a moratorium on the use of DU weapons.¹⁷⁷ Through the proportionality provision, judges may effectuate this growing desire.

4. Connection between *Jus in bello* and *Jus ad bellum*

A growing merging of the law of armed conflict's two doctrinal areas also provides judges more latitude to increase the power of the court and increases the potential of the court overstepping its role. The law of armed conflict is divided into two areas: the legality of resorting to war (*jus ad bellum*¹⁷⁸) and the legality of specific military action once war has begun (*jus in bello*¹⁷⁹). Put differently, *jus ad bellum* controls *whether* a nation can fight and *jus in bello* controls *how* a nation fights.

Traditionally, under the law of armed conflict, judgments about the legality of how a nation fights have been independent of judgments about the legality of whether a nation can fight.¹⁸⁰ The firm delineation has been thought necessary to effect the purpose of *jus in bello*, which is the protection of individuals such as civilians, prisoners, and the wounded. It has been feared that if *jus ad bellum* considerations were allowed to influence *jus in bello* considerations, individuals on the side of the party perceived to

¹⁷⁵ U.S. Department of State, Voting Practice in the United Nations 96 (2002), *available at* <http://www.state.gov/documents/organization/21489.pdf> (last visited March 8, 2006).

¹⁷⁶ *Id.*

¹⁷⁷ European Parliament Resolution on Non-proliferation of Weapons of Mass Destruction: A role for the European Parliament, 2005/2139(INI) ¶ 82 (Nov. 17, 2005), *available at* <http://www.europarl.eu.int/omk/sipade3?PUBREF=-//EP//TEXT+TA+P6-TA-2005-0439+0+DOC+XML+V0//EN&LEVEL=4&NAV=X&L=EN> (last visited March 8, 2006).

¹⁷⁸ *Jus ad bellum* translates to law on the use of force.

¹⁷⁹ *Jus in bello* translates to law in war.

¹⁸⁰ Additional Protocol I, *supra* note 168, pmbl. (stating that the protocol and the four 1949 Geneva Conventions must be applied ' . . . without any adverse distinction based on the nature or origin of the armed conflict'). *See also* Andreas Laursen, *supra* note 174, at 787 (citing George Abi-Saab, *The Concept of "War Crimes"*, in INTERNATIONAL LAW IN THE POST-COLD WAR 111 (Sienho Yee et al. eds., 2001)).

have wrongly resorted to war would be accorded less protection or, at a minimum, that the protection of individuals would become subsidiary to debates and judgments about whether the war was just or aggressive.¹⁸¹

The firm distinction between *jus ad bellum* and *jus in bello* may be fading. The committee established by the ICTY prosecutor to Review NATO's actions noted that "[t]he precise linkage between *jus ad bellum* and *jus in bello* is not completely resolved."¹⁸² Even that fairly innocuous language is telling. Using the term "linkage" presumes there is a linkage, whereas, traditionally, it had been the rule that no such linkage exists.

Those who favor a connection tend to argue that in lieu of the purposes underlying *jus in bello*, "it would not . . . be unreasonable to let *jus ad bellum* justifications . . . influence or aid in the interpretation of *jus in bello* rules, as long as the goal and objective is a better, more comprehensive protection of individual persons."¹⁸³ Some scholars argue that if force is justified by humanitarian intervention, which is a *jus ad bellum* consideration, *jus in bello* is more restrictive, limiting targets of attack not to the general rules of necessity and proportionality, but to more specific rules about what is necessary and proportionate to achieve the specific humanitarian purpose.¹⁸⁴ In short, these scholars hold that the range of lawful military activities in war is bounded not only by the general laws of armed conflict, but by the purpose of the military intervention.

This specific example may seem narrow, but the general principle—that the range of lawful military activities should be restricted by considerations relating to the legality of resorting to force so that the protection of individuals is heightened—applies more broadly. It follows that the range of military activities by the attacking state should be restricted and thus heightened protection should be granted to individuals of the nation

¹⁸¹ See Theodor Meron, *The Humanization of Humanitarian Law*, 94 AM. J. INT'L L. 239, 241 (2000) ("the separation between *jus ad bellum* and *jus in bello* results in the uniform, neutral application of the latter . . . and avoids . . . preliminary disputes on the character of the war as just or aggressive").

¹⁸² NATO Prosecution Report, *supra* note 171, at ¶ 32.

¹⁸³ Laursen, *supra* note 180, at 788.

¹⁸⁴ *Id.* at 788 & n.92 citing (Cristopher Greenwood, *International Law and the NATO Intervention in Kosovo*, 49 INT'L & COMP. L. Q. 926, 933 (2000); Cristopher Greenwood, SELF DEFENSE AND THE CONDUCT OF INTERNATIONAL ARMED CONFLICT, IN INTERNATIONAL LAW AT A TIME OF PERPLEXITY 273-88 (Y. Dinstein ed., 1989)).

being attacked when the legality of resorting to force is more questionable or contentious. Thus, some military activities conducted in a war that is legally suspect would be ruled unlawful whereas those same activities would be lawful in a war whose legality is unquestioned.

If the standards of *jus in bello* are permitted to be influenced by considerations of *jus ad bellum*, it greatly increases the probability for judicial policymaking and improper prosecutions. It increases the ability of ICC judges who believe a nation illegally resorted to the use of force but who cannot so rule¹⁸⁵ to exact punishment on military personnel and civilian policy makers for performing acts that otherwise would be considered legal.

The foregoing discussed the potential consequences of a formal, *de jure* linkage between the legality of resorting to force and the legality of individual military activities as part of that use of force. Even if *jus in bello* analysis remains distinct from *jus ad bellum* considerations *de jure*, it seems reasonable to believe that the same may not be so *de facto*. Judges who believe a use of force to be illegal may find it difficult to ignore that belief when ruling on the legality of specific military activities that harmed, albeit innocently, protected individuals.

Regardless of whether *jus ad bellum* and *jus in bello* become linked as a matter of law or as a matter of fact, the ICC will be empowered to hold military activities to a higher standard when the use of force in which those military activities were conducted is legally suspect or disfavored by the judges.

5. Disclosure of Sensitive or Classified Information

The Rome Statute grants the court the power to request State Parties to disclose evidence and they are under a general obligation to comply.¹⁸⁶ A State Party may deny the request only if it concerns information that relates to “its national security.”¹⁸⁷ If the

¹⁸⁵ Until the crime of aggression is defined, the ICC is not empowered to rule on the legality of resorting to force. See section entitled, “Aggression.”

¹⁸⁶ Rome Statute, *supra* note 3, art. 93(1). See also, *Id.* art. 86, which sets forth the general obligation of states to cooperate with the court.

¹⁸⁷ *Id.* art. 93(4).

court determines that the evidence is relevant and necessary to establish the guilt or innocence of the accused and that State is not fulfilling its obligation to cooperate, it can refer the state to the Assembly of State Parties for noncompliance.¹⁸⁸ If the court makes the stronger finding that the requested information is not related to the requested state's national security, the court can order disclosure. The key, then, is what is meant by the term "*its* national security" in the provision referenced above.

Suppose the court attempts to gather information about a U.S. military action. It requests information from the United Kingdom or some other NATO member that is a State Party and with which the United States shares sensitive information. The United Kingdom (or other requested state) is not willing to share U.S. classified information and denies the request. Whether the court can order disclosure versus merely report the noncompliance to the Assembly of State Parties depends on whether the Court holds that disclosure would prejudice the United Kingdom's national security. Clearly, disclosure would prejudice the United States' national security, but less clear is whether it would prejudice the United Kingdom's national security. It may be that the information would reveal sources and methods of U.S. but not U.K. intelligence and thus is not sensitive to the United Kingdom independent of its sensitivity to the United States. In such a scenario, the court might order disclosure and the United Kingdom would have to decide whether to comply with the court or to comply with U.S. demands to keep the information secret and thus ignore the United Kingdom's treaty obligation as interpreted by the court. Such a scenario could place great stress on relations between the United States and its allies.

D. Effect of the Elements of Crimes

Elements of Crimes were drafted after the Rome Statute was completed to narrow the bounds of the Rome Statute's provisions. However, in most cases, the Elements of Crimes are no more precise than the provisions they were supposed to delineate.

¹⁸⁸ *Id.* art. 72(7)(a)(ii).

The imprecision of the Rome Statute's criminal provisions occasioned substantial debate among the delegations at Rome about how to resolve the imprecision. Many delegations were unconcerned by the ambiguity and argued that ICC judges could resolve any uncertainty.¹⁸⁹ In addition, many delegations, far from merely being unconcerned, welcomed the imprecision.¹⁹⁰ They believed it would expand the court's discretion, which would allow the ICC to go beyond just adjudicating criminal cases to defining and progressing the law.¹⁹¹ Put differently, many delegations sought a Rome Statute that encourages judges to make policy, which the ambiguity of the Rome Statute's provisions permit.

The United States felt differently and spent a large amount of its negotiating capital to obtain references in the Rome Statute to Elements of Crimes that were to be negotiated after the completion of the conference in Rome and that the United States hoped would more clearly delineate the Rome Statute's offenses.¹⁹² The Elements of Crimes have since been completed¹⁹³ and in a few cases, the United States' hopes for greater specificity were realized. For example, the Rome Statute prohibits "Killing or wounding *treacherously* individuals belonging to the hostile nation or army."¹⁹⁴ Killing or wounding individuals belonging to the hostile nation or army is common, proper, and necessary when engaged in armed conflict. However, this provision prohibits it if it is done "treacherously" and the Rome Statute gives no guidance as to what that means. In

¹⁸⁹ Lietzau, *supra* note 121, at 481.

¹⁹⁰ *Id.* at 482.

¹⁹¹ *Id.*

¹⁹² Lietzau, *supra* note 121, at 481. The Rome Statute references the Elements of Crimes in articles 9 and 21. Article 9 states: "Elements of Crimes shall assist the Court in the interpretation and application of articles 6, 7 and 8. They shall be adopted by a two-thirds majority of the members of the Assembly of States Parties." Rome Statute, *supra* note 3, art. 9. Article 21 sets forth the statute's applicable law. It states: "The Court shall apply: (a) In the first place, this Statute, Elements of Crimes and its Rules of Procedure and Evidence; (b) In the second place, where appropriate, applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict; (c) Failing that, general principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with this Statute and with international law and internationally recognized norms and standards." *Id.* art. 21(1).

¹⁹³ See *Assembly of States Parties to the Rome Statute of the International Criminal Court*, 1st Sess., Official Records, U.N. Doc ICC-ASP/1/3, at 112 (2002) [hereinafter *Elements of Crimes*].

¹⁹⁴ Rome Statute, *supra* note 3, art. 8(2)(b)(xi) (emphasis added).

this case, the Elements of Crimes resolves the ambiguity. It makes clear that the offense is committed only when the perpetrator causes victims to believe that international law entitles the victims to, or requires the perpetrators to accord, protection, and wounds or kills the victims while making use of and betraying that belief.¹⁹⁵

In most cases, however, the Elements of Crimes did nothing to resolve an offence's ambiguity. For example, as discussed previously,¹⁹⁶ article 8(2)(a)(iii) prohibits, "Wilfully causing great suffering, or serious injury to body or health," but there is no guidance (or consensus) as to what is meant by "great suffering" or "serious injury." Here, the Elements of Crimes are of no use. They delineate the offense as follows:

1. The perpetrator caused great physical or mental pain or suffering to, or serious injury to body or health of, one or more persons.
2. Such person or persons were protected under one or more of the Geneva Conventions of 1949.
3. The perpetrator was aware of the factual circumstances that established that protected status.
4. The conduct took place in the context of and was associated with an international armed conflict.
5. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.¹⁹⁷

Here the Elements of Crimes does not resolve the ambiguity regarding the terms "great suffering" and "serious injury"; it merely restates them. Thus, it is left to the court's judges to determine the terms' meanings and the offense's reach, and thereby the court's power.

Another example of the inability of the Elements of Crimes to resolve critical ambiguity is in the proportionality provision discussed previously.¹⁹⁸ There, the critical issue was whether committing the offense required (1) the perpetrator to have known only that the attack would cause civilian damage and it would be left up to judges to

¹⁹⁵ *Elements of Crimes*, *supra* note 193, at 137.

¹⁹⁶ See *supra* section entitled "Wilfully Causing Great Suffering, or Serious Injury to Body or Health".

¹⁹⁷ *Elements of Crimes*, *supra* note 193, at 127.

¹⁹⁸ See *supra* section entitled "The Rome Statute's Proportionality Provision."

determine whether the damage was clearly excessive in relation to the military advantage anticipated, or (2) whether the perpetrator must have also known that the civilian damage was clearly excessive when launching the attack.

The introduction of the Elements of Crimes provides a general rule for how to interpret such knowledge requirements. “With respect to mental elements associated with elements involving value judgment, such as those using the terms ‘inhumane’ or ‘severe’, it is not necessary that the perpetrator personally completed a particular value judgment, unless otherwise indicated.”¹⁹⁹ Thus, generally, the court has the power to make the value judgment the offense requires. In delineating the elements of this provision, however, the Elements of Crimes provides in a footnote stating, “As opposed to the general rule set forth in . . . the General Introduction, this knowledge element requires that the perpetrator make the value judgment as described therein.”²⁰⁰ This appears to require that the perpetrator knows that an attack’s resultant damage would be clearly excessive. If so, this would remove a significant source of judicial discretion surrounding this offense, because a perpetrator’s subjective belief about whether damage would be clearly excessive would control. A judge’s belief as to the excessive character of an attack’s damage would be irrelevant. However, the same footnote later states, “An evaluation of that value judgment must be based on the requisite information available to the perpetrator at the time.” This sentence appears to contradict and counter the effect of the first part of the footnote, which appears to rest liability on the perpetrator’s value judgment. If it were the case that the offense requires the perpetrator to make the value judgment that the damage would be clearly excessive, as the first part of the footnote appears to state, then there would be no need for the court to evaluate the propriety of that value judgment, which the second part of the footnote allows. That is, under the first part of the footnote, the perpetrator could only be liable if he launches the attack having judged the resultant damage to be clearly excessive. If the perpetrator does not believe the resultant damage would be clearly excessive, he cannot have committed the offense. Thus, the only relevant factor is the perpetrator’s subjective belief. Whether that belief is

¹⁹⁹ *Elements of Crimes*, *supra* note 193, at 112.

²⁰⁰ *Id.* at 132 n.37.

correct, or even objectively reasonable, is irrelevant, which leaves little room for judicial policymaking here. But the second part of the footnote invites the court to evaluate the perpetrator's value judgment, which implies that something more than the perpetrator's subjective belief is relevant, and opens the door rather widely for judges to make more restrictive law.

Even if the Elements of Crimes provided judges with more precise guidance, they may be free to disregard it. The Rome Statute itself is inconsistent on the effect of the Elements of Crimes, specifically, whether they are a source of law or merely a tool to assist the court in applying the relevant law. Put differently, the issue is whether the Elements of Crimes are binding on the court or merely persuasive. Article 21, which delineates the law the ICC is to apply in adjudicating matters before it states that the "Court shall apply . . . the Elements of Crimes."²⁰¹ This language, particularly the use of the word "shall" is the language of obligation and binding instruction. Moreover, because article 21 lists the ICC's sources of law, it designates the Elements of Crimes as a source of law. In addition, article 21 places the Elements of Crimes ahead of customary international law in its hierarchy of applicable law, which highlights the Elements' importance as binding authority.²⁰² On the other hand, Article 9 states that the Elements of Crimes "shall *assist* the Court in the interpretation and application of [the Rome Statute's criminal provisions]."²⁰³ According to one scholar, "shall assist" is not the language of a binding obligation, but is "the language of exhortation, of encouragement."²⁰⁴ "Shall apply," which article 21 uses, or "shall adhere to" is more forceful.

Many scholars, noting the inconsistency of articles 9 and 21, have concluded that the Elements of Crimes are not binding but merely persuasive, and have done so without even addressing the possibility that the Elements might be binding.²⁰⁵ Other

²⁰¹ Rome Statute, *supra* note 3 art. 21.

²⁰² *Id.*

²⁰³ *Id.* art. 9 (emphasis added).

²⁰⁴ Shabtai Rosenne, *Poor Drafting and Imperfect Organization: Flaws to Overcome in The Rome Statute*, 41 VA. J. INT'L L. 164 (2000).

²⁰⁵ E.g., Valerie Oosterveld, *Sexual Slavery and the International Criminal Court: Advancing International Law*, 25 MICH J. INT'L L. 605, 627 (2004); Herman von Gabel, *The Making of the Elements of*

commentators, noting this treatment, have concluded that the majority opinion is that the Elements of Crimes are not binding on the court.²⁰⁶ In this dispute, the opinion of Mauro Politi deserves noting. Politi opined that “the elements are meant to be used by the judges as simple guidelines in reaching determinations as to individual criminal responsibility.”²⁰⁷ Politi’s opinion warrants specific mention because he is now an ICC judge.

If the Elements of Crimes are binding, they would limit judicial discretion to some extent, at least for those few offenses for which the Elements of Crimes are defined precisely. If the Elements of Crimes are merely advisory, ICC judges would have substantial authority and discretion in determining not only whether a given activity constituted a crime, but what activity, in the abstract, could constitute a crime.

This is in keeping with civil law jurisdictions. In the United States, for a defendant to be found guilty of a crime, every element of that crime must be proved beyond a reasonable doubt. In contrast, civil law jurisdictions do not break a single crime into separate elements. Rather, the standard for conviction is “the judge’s intimate conviction of the defendant’s guilt, based on the totality of the evidence presented.”²⁰⁸ As with all of the Rome Statute’s other ambiguities, it is judges who will resolve the ambiguity and thus decide whether the Elements of Crimes bind them or merely advise them. It seems unlikely that they will decide the former and thereby impose bounds on themselves.

E. Effect of “*Nullum Crimen Sine Lege*”

Nullum crimen sine lege translates to no crime without law and is given force through article 22, which holds that “A person shall not be criminally responsible under this Statute unless the conduct in question constitutes, at the time it takes place, a crime

Crimes, in THE INTERNATIONAL CRIMINAL COURT: ELEMENTS OF CRIMES AND RULES OF PROCEDURE AND EVIDENCE 7-8 (Roy S. Lee ed., 2001), cited in Tina R. Karkera, *The International Criminal Court's Protection of Women: The Hands of Justice at Work*, 12 Am U. J. GENDER SOC. POL'Y & L. 197 (2004).

²⁰⁶ Wessel, *supra* note 101, at *36.

²⁰⁷ Mauro Politi, *Elements of Crimes*, in 1 THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT, *supra* note 163, at 447

²⁰⁸ *Id.* at 446.

within the jurisdiction of the Court.”²⁰⁹ Article 22 would appear to mandate that judges narrowly construe the criminal provisions of the Rome Statute, which would limit the ability of judges to make policy and expand the law. If a provision is ambiguous, interpreting that provision broadly to encompass conduct that was not clearly criminal when it took place would result in holding someone criminally responsible for conduct that was not a crime until after the broad interpretation, which article 22 prohibits. Paragraph 2 of article 22 makes this clear. It states, “The definition of a crime shall be strictly construed and shall not be extended by analogy. In case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted, or convicted.”

If history is a guide, however, this provision will do nothing to prevent judges from expanding the law and making policy. The governing charters of both the ICTY and ICTR contained similar provisions to enforce the principle of *nullum crimen sine lege*, and those tribunals’ judges expanded the law, sometimes quite extensively.²¹⁰ Moreover, many at Rome argued that the “basic legal principle of *nullum crimen sine lege* . . . does not require the same precision regarding the elements of international crimes as it does in domestic legal systems, and does not require a written rule.”²¹¹ Thus, article 22 may have little if any effect on restraining judges from expanding the law if they are inclined to do so.

F. Summary

The Rome Statute’s provisions presented in this section illustrate the ambiguity laden throughout the Rome Statute and the degree to which that ambiguity increases the potential for judicial policymaking. The two substantive provisions that are discussed were chosen because of the wide array of conduct that could implicate the provisions and

²⁰⁹ Rome Statute, *supra* note 3 art. 22(1).

²¹⁰ See generally Mohamed Shahabuddeen, *Does the Principle of Legality Stand in the Way of Progressive Development of Law*, 2 J. INT’L CRIM. J. 1007 (2004) (surveying cases before the ICTY and the European Court of Human Rights and concluding that the principle of *nullum crimen sine lege* does not bar judges from expanding the law).

²¹¹ Mumford, *supra* note 36, at 180 (quoting European Law Students’ Association, HANDBOOK ON THE DRAFT STATUTE FOR AN INTERNATIONAL CRIMINAL COURT 18 (2d ed. 1998)).

the frequency with which the issues could arise. Many of the acts the Rome Statute proscribes are defined ambiguously and based upon subjective judgments. Thus, their criminality depends upon (1) the interpretation of the ambiguous provisions, and (2) whether judges make different subjective judgments than those performing the acts.

This invites two possibilities by which the court could seek to try U.S. civilian officials and military personnel for acts the United States insists are lawful. First, the United States and the ICC honestly disagree about the law. Related to that, some judges may be driven by a desire to progress the law in the direction of increasingly criminalizing more types of military conduct. Second, the ICC exploits the ambiguity and subjectivity of the Rome Statute's provisions to pursue politically motivated prosecutions against U.S. nationals. Although the second possibility seems more pernicious, either has the same result: an improper prosecution. The court would seek to try U.S. civilian officials and military personnel for acts that are not clearly criminal, which would likely restrain the United States and limit its freedom of action.

Even in cases in which no U.S. national is involved, ICC rulings could affect U.S. interests. The rulings the court will hand down on both substantive and procedural matters will become binding law and will apply in future cases, including those involving U.S. nationals. In addition, decisions that progress the law increase the risk, and thus the costs, of any military engagement by increasing the probability that an engagement could result in a prosecution.

V. Judicial Independence

The previous section discussed how the Rome Statute's ambiguity permits judges to issue rulings that accord with their ideology and, specifically, to expand the law and allow the court to improperly exceed its role. However, judges can exploit this ambiguity only if they are sufficiently independent, that is, if their actions are bound by few constraints. Thus, the extent to which judges progress the law, and engage in policymaking generally, is a function of the constraints that judges face. Fewer constraints results in greater judicial discretion and greater potential for policymaking. More constraints results in less judicial discretion and less potential for policymaking.

This section details how the Rome Statute grants ICC judges tremendous independence by imposing few constraints on them.

One can conceptualize the relationship between states and judges through the principle-agent model. There are many principles (the State Parties) and many agents (the judges), but a given judge is not the agent of just his home state (the state of which he is a national). Each judge is an agent of every State Party. However, a judge's home state is likely the only state (the only principle) that could have sway over that judge (agent).

Typically in the principle-agent model, the principle desires to constrain the agent so that the agent accomplishes the principle's goals. Complicating the analysis is that, with regard to the ICC, many states believe that their goals would be best accomplished if agents were to be unconstrained. Specifically, states that wish judges to progress the law or act politically may believe that, given the States that are party to the ICC, which elect the judges, and the pool of the community of international law scholars from which judges would be drawn, judges would be more likely to progress the law or act counter to U.S. interests if judges (the agents), as a whole, were unconstrained by the states generally (the principles). This may explain why the states at the Rome Conference created a court in which they, the principles, have little ability to constrain judges, their agents, which is counter to the standard principle-agent model in which principles desire to constrain their agents within some bounds.

To structure the discussion of judicial independence, potential constraints on judges can be separated into three categories: creational, external, and internal.²¹²

A. Creational Constraints

Creational constraints are inherent in the language the drafters of a set of rules that judges are to interpret (in this case, the Rome Statute) choose to limit judicial discretion.²¹³ Different provisions constrain judges differently. "The degree of elasticity of words and texts varies, and can be controlled as a deliberate strategy. . . . [T]extual

²¹² This taxonomy is presented in Wessel, *supra* note 101.

²¹³ *Id.* at *7.

determinacy is always a matter of degree, and the degree to which a rule exhibits determinacy varies from rule to rule.”²¹⁴ As discussed in the previous section, primarily with respect to the proportionality provision, the Rome Statute contains weak creational constraints.

B. External Constraints

External constraints are those that parties external to the court (i.e. states) can place on judges. States cannot directly affect judges’ rulings and states have little direct oversight over judges, but states’ actions may be able to affect (1) the operations of the court generally, and (2) the effect judges’ rulings have, even potentially reducing them to a dead letter.

1. Exit (Withdrawal)

The Rome Statute permits State Parties to withdraw from the ICC.²¹⁵ Judges, and the court generally, derive their influence from their judgments being followed. The greater the number of states that are party to the ICC means the greater the number of states that are treaty bound to follow the ICC’s judgments. States withdrawing from the ICC would lessen judges’ influence. Presumably, judges have some desire to have greater influence. Thus, the ability to withdraw restrains judges to some extent.

The United States is not a State Party, so it has no threat of exit, at least not from the ICC. It is, however, such a significant player on the international stage that its threat of exit from other international roles and responsibilities may also play a role in restraining ICC judges. For example, U.S. forces are involved in, if not required for, many U.N. peacekeeping missions. The United States may threaten to exit from peacekeeping in response to adverse ICC rulings, including rulings that do not involve a U.S. national but in which the court expands its reach or greatly restricts permissible military action. Even if the United States does not explicitly make this threat, it always implicitly exists, and that may have some restraining effect.

²¹⁴ *Id.* at *8 n.32 (quoting THOMAS FRANCK, *THE POWER OF LEGITIMACY AMONG NATIONS* 50 (1990)).

²¹⁵ Rome Statute, *supra* note 3, art. 49.

It may be, though, that this threat has little force. After twice succeeding, the U.S. failed in its third bid to have the U.N. Security Council pass a resolution requiring the ICC to defer from investigating cases emanating from U.N. Peacekeeping missions for 12 months. If the threat of exiting from U.N. peacekeeping missions were to have any force, it likely would have had its greatest force before the Security Council, which authorizes U.N. peacekeeping, and over a matter directly related to the viability of peacekeeping. If the threat of withdrawing from U.N. peacekeeping was insufficient to convince the Security Council to pass a resolution protecting U.N. peacekeepers, then it probably would be insufficient to convince individual, independent ICC judges to refrain from issuing rulings averse to the United States over matters not directly involved in U.N. peacekeeping.

More generally, the potential of a state exiting probably has little practical effect. Few states have the ability to project power. Most of those that do—including the United States, Russia, and China—are not members of the ICC. Thus, there are few State Parties to the ICC that would be subject to harm from, and therefore likely to withdraw due to, ICC judicial policymaking.²¹⁶ This dearth of natural stakeholders among ICC State Parties results in little threat of State Party withdrawal, and thus little judicial restraint to be yielded from the ability to withdraw. That few of the ICC State Parties are likely to be subjected to the proscriptions of the Rome Statute results in the ICC being a rather undemocratic rulemaking regime in which non-acting states (as defined by the ability to project military power) will make the rules that bind acting states.

It need not be the case, though, that ICC State Parties without the ability to project military power are not stakeholders in ICC policymaking. Powerful states, both those

²¹⁶ This contrasts with the International Court of Justice (ICJ) in that States have withdrawn from agreements that submit disputes to the ICJ after adverse rulings by that court. That states have withdrawn from these agreements is clear. Less clear is the reasons underlying and the effect of their withdrawal. This section discusses whether withdrawal, or the threat thereof, can constrain judges. Withdrawal from agreements submitting disputes to the ICJ in response to disfavored ICJ rulings may not have been intended to affect future ICJ decisions, and these actions may not have had that effect. Rather, withdrawal may have been motivated by a simpler, more practical, and more easily obtained desire: to limit a state's exposure to decisions of a court with whose rulings the state disagrees. Because few states will be directly affected by ICC rulings, state actions with regard to the ICJ may not be a good model for or predictor of state actions with regard to the ICC and the extent to which the threat of withdrawal can constrain ICC judges.

that are ICC State Parties, such as the United Kingdom, as well as those that are not State Parties, such as the United States, Russia, and China, are also diplomatically powerful states that hold sway, to varying degrees, over the less powerful states that constitute the majority of ICC State Parties. By exerting their diplomatic power, powerful states can affect the actions of weaker states with respect to the court. The powerful states probably could not influence the weaker states to take actions as audacious as withdrawing from the court, but may be able to convince them to take less bold action that nonetheless frustrates the court from implementing its judgments, such as not complying with the court's rulings. In short, the ability to withdraw from the ICC seems to have little constraining effect.

2. Noncompliance

Through its array of tribunals, the international community has several judiciary branches but no legislature or executive branch. Legislatures can limit judges through their ability to create new laws to counter judicial action. Executives are often necessary to enforce the law generally, and judicial rulings specifically. The effect of the absence of these bodies on judicial policymaking tends to offset.

Whereas the lack of a legislature increases the ability of international judges to make law, or at least to have the law it makes stand without being overruled, the lack of an executive constrains. Without an executive, international law is often self-enforced and, occasionally, enforced by other powerful states. If a state violates the law or a specific judicial ruling, it is left to other states to force it to comply. A ruling with which many states, or at least those states needed to enforce it, disagree will not be enforced, and the ruling will become a dead letter.

This general rule applies to the ICC. The ICC has no police or marshals to investigate matters or enforce its decisions. If the ICC makes a ruling, it is reliant on State Parties to abide by that ruling and assist the court in enforcing it. If the prosecutor initiates an investigation, the ICC relies on State Parties to assist the ICC by sharing or otherwise making evidence and witnesses available, or, at a minimum, by permitting the ICC to investigate if not actively assist in that investigation. For example, much of the evidence regarding an alleged crime will be in the state, specifically in the place, where

the act occurred. If that state refuses to cooperate by blocking access to ICC investigators or otherwise making witnesses and other evidence unavailable, the investigation and prosecution may be unable to progress.

A matter investigated by the ICTY provides an example of the importance of cooperation of states in which evidence is located. The Croatian government held information about crimes committed by Croats in Bosnia but, for years, refused to disclose it and denied it possessed it.²¹⁷ Only after a new Croatian government that decided to cooperate with the ICTY took power did the ICTY gain control of this critical evidence.²¹⁸

The case of Jean-Bosco Barayagwiza before the ICTR illustrates how a state that disagrees with the court's ruling and upon which the court relies for its operations can constrain the court generally and the rulings of judges specifically. Barayagwiza is believed to have been prominently involved in the mass killings in Rwanda and the court charged him with genocide and other crimes.²¹⁹ Barayagwiza moved to quash the arrest and have the charges dismissed based primarily on his claim that his pretrial detention had been too lengthy.²²⁰ The Appeals Chamber agreed with Barayagwiza and dismissed the charges against him with prejudice, meaning they could not be brought again and Barayagwiza could not be tried for the crimes he allegedly had committed.²²¹

Rwanda, furious at the decision, ceased cooperating with the court on all other prosecutions.²²² Rwanda barred the ICTR prosecutor from entering the country by refusing to issue a visa and forced another trial to be suspended by prohibiting witnesses from traveling to Tanzania, the seat of the court, to testify.²²³ Effectively, Rwanda's cessation of cooperation halted the court's ongoing investigations and prosecutions. By

²¹⁷ Danner, *supra* note 59, at 528 n.145 (citing Marlise Simons, *Archives Force Review of Croat's Atrocity Case*, N.Y. TIMES, Nov. 21, 2002, at A14).

²¹⁸ *Id.* at 528 n.146 (citing Dominic Hipkins, *Blaskic Appeal: Defence Lawyer Reveals New Evidence*, IWPR [Institute for War & Peace] REP. (Jan. 28, 2002).

²¹⁹ Schabas, *supra* note 29, at 563.

²²⁰ *Id.* at 565.

²²¹ *Id.*; Prosecutor v. Barayagwiza, Appeals Decision, No. ICTR-97-19-DP ¶¶ 67, 71 (Nov. 3, 1999).

²²² Emmanuel Goujon, *Rwanda Suspends Cooperation with Genocide Court over Release*, AGENCE FRANCE-PRESSE, Nov. 6, 1999.

²²³ Jacob Katz Cogan, *International Criminal Courts and Fair Trials: Difficulties and Prospects*, 27 YALE J. INT'L L. 111, 135 (2002).

refusing to cooperate in, and thus imperiling, the court's work, work that Rwanda supported and wanted to come to fruition, Rwanda was playing a high stakes game of chicken with the court. If neither Rwanda nor the court relented, both would lose. The investigations and prosecutions would remain halted. The court would be rendered powerless and Rwanda would not see justice come to those responsible for the genocide. If Rwanda relented first by abandoning its protest and resuming cooperating with the court, it would lose on the Barayagwiza issue, but its broader interests would be met through the court's prosecution of others involved in the genocide. If the court relented first, it would revisit and reverse its ruling on Barayagwiza, thus signaling that Rwanda exercised considerable control over the court because of its control over witnesses and evidence the court needed, but the court would be back in operation. The court blinked. Its dependence on Rwanda for other investigations and prosecutions forced it to reverse its ruling and satisfy Rwanda's demands.²²⁴

The broader message to be gleaned from the Barayagwiza case is that judges will be constrained, at least to some extent, by the wishes of states upon whom the court relies for its operations. The more dependent the court is on a particular state, the more the state's wishes will constrain the court's judges. Given the outrageousness of the court's first Barayagwiza ruling—Barayagwiza would escape prosecution for acts of genocide, one of the world's most heinous crimes, because of a lengthy pre-trial detention, much of which occurred in a different country beyond the control of the ICTR—it may be that judges will only be constrained from issuing rulings that shock the conscience of a state upon which the court depends.

It may be, though, that the actions of other states upon which the court does not depend still have some restraining effect. Despite that ICC State Parties are treaty bound to cooperate with investigations and prosecutions,²²⁵ a State Party may ignore that obligation in the face of a ruling with which it disagrees, and it will be more likely to ignore its obligations to the court and the court's rulings if it believes the court is generally exceeding its role. A ruling to investigate a U.S. national or otherwise

²²⁴ Schabas, *supra* note 29, at 531.

²²⁵ Rome Statute, *supra* note 3, art. 86.

significantly counter to U.S. interests is likely to bring the full weight of U.S. diplomacy down onto the states whose cooperation is needed for the investigation or prosecution to progress. If those states are ICC State Parties, they will have to decide whether to act counter to U.S. interests or to violate their treaty obligations to the ICC. The consequences of each differ markedly. Acting counter to U.S. interests invites whatever consequences the United States may impose, which could be quite severe. Violating a treaty obligation to the ICC may bring about nothing more than a tepid response. The court can refer the matter to the Assembly of State Parties,²²⁶ which can make a finding of noncompliance that seems intended to publicly shame the noncomplying nation but does not have any substantive effect.²²⁷ In addition, just as the United States may retaliate against the state for acting counter to U.S. interests, if the state complies with U.S. interests, other states that want it to follow the ICC's rulings may act against it.

This battle between U.S. views on the one hand and ICC treaty obligations and other states' views on the other hand differs only slightly from any other international situation in which the United States is attempting to persuade other states to adopt its view of a matter it considers of supreme importance. In such an instance, the United States will use whatever inducements or dissuasion it believes necessary and appropriate to persuade other states to accord with U.S. interests. States that have the opposite view of things will do the same. A state must decide whether to follow U.S. requests or those of other states. Factors that the decision would turn on include the particular relationships between the state in question and United States versus the opposing state, the power the United States and the opposing state wield over the other state, including threats the United States could issue and punishments it could impose, and how important the issue is to the other state. The only additional factor when this diplomatic battle occurs in the context of an order from the ICC is the ability of the Assembly of State Parties to find a state in noncompliance, which is likely to have little effect, especially in

²²⁶ *Id.* art. 87(7).

²²⁷ SCHABAS, *supra* note 13, at 107. Some commentators claim that the Assembly of State Parties might be able to act substantively against the noncomplying state by, for example, imposing sanctions. Danner, *supra* note 59, at 529 n.155 (quoting Annalisa Ciampi, *Other Forms of Cooperation*, in 2 THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY, *supra* note 163, at 1635). Despite the commentator's claims, the Rome Statute does not explicitly provide for such action. *Id.*

consideration of and comparison to the potentially weighty inducements and dissuasions being offered by the United States and states holding an opposing view.

In sum, the need for self-enforcement and Party-State enforcement of ICC rulings could restrain judges from following their own policy preferences. This restraining effect likely will be greatest when there is the potential that a judge's ruling would run counter to the interests of a state needed for the judge's ruling to be enforced.²²⁸

On the other hand, it may be that the need to gain cooperation of other states empowers judges to progress the law, rather than restrains them. Likely, the ICC will require the cooperation of a state for two reasons. One, the state controls the *situs* of the alleged crime. Two, the state controls access to critical evidence of the alleged crime, including witnesses. Most often, this will occur only when the state is the perpetrator or the victim²²⁹ of the crime. If the state is the perpetrator, it likely will not cooperate with the court regardless of the court's restraint or lack thereof. Knowing that cooperation will be unlikely regardless of the court's ruling frees judges from the consequences of their rulings and empowers them to issue whatever rulings they desire. In this situation, a state's noncompliance increases rather than restrains the potential for judicial policymaking. If the state is the victim of the alleged crime, this too could lead to judges progressing the law, because the state whose cooperation is needed likely would be eager for the perpetrator(s) to be punished. The state would have no desire to restrain judges from expanding the law. Therefore, the need to gain the cooperation of some states, which would seem at first blush to have a constraining effect on judges (and historically has had a restraining effect on some occasions) may instead provide judges with greater ability to make new law.

²²⁸ See Danner, *supra* note 59, at 511.

²²⁹ The perpetrators of crime within the court's jurisdiction are individuals, not states. The state is labeled the perpetrator here in the sense that nationals of the state were implementing state policy in committing the acts alleged to be crimes. Similarly, true victims of war crimes, genocide, and crimes against humanity are individuals, not states. The state is labeled a victim here in the sense that the crime was committed on the state's territory and, likely, against the state's nationals.

3. Alteration

The potential for judicial policymaking also depends on the extent to which State Parties can formally override the decisions of the court. If the court makes a ruling interpreting the Rome Statute that displeases a number of State Parties and the State Parties can easily amend the Rome Statute so it accords with their preferred interpretation as opposed to that of the court, it significantly diminishes the potential for judicial policymaking. State Parties, in effect, would legislatively override the court. In contrast, if the court makes a ruling interpreting the Rome Statute that displeases a number of State Parties and the State Parties can amend the Rome Statute only with great difficulty, it significantly increases the potential for judicial policymaking. The court's rulings would be virtually sacrosanct.

The Rome Statute is difficult to amend. First, the Rome Statute, and thus the court's rulings, may not be amended within the first seven years from which it entered into force, which was July 1, 2002.²³⁰ Second, the provisions of the Rome Statute that enumerate the crimes over which the court has jurisdiction can only be amended when seven-eighths of all State Parties assent.²³¹ Third, the amendments only apply to those State Parties that assent.²³² State Parties that do not assent to the amendment and non-State Parties are bound by the original provision (and the court's interpretation of it). Thus, if the court issues a ruling that so offends that it motivates seven-eighths of all State Parties to amend the Rome Statute, the offending ruling will still apply to non-State Parties such as the United States. This means that, paradoxically, non-State Parties, which are states that have not assented to the court's authority and have manifested an

²³⁰ Rome Statute, *supra* note 3, art. 121(1).

²³¹ *Id.* arts. 121(4), 121(5). Article 121(3) provides that an amendment is adopted when two-thirds of the Assembly of State Parties assent. *Id.* The amendment will enter into force only when seven-eighths of all State Parties ratify the amendment. *Id.* art. 121(4).

²³² *Id.* art. 121(5). If the amendment concerns one of the Rome Statute's substantive criminal provisions, it will apply only to those states that ratify it. *Id.* art. 121(5). If the amendment concerns any other provision of the Rome Statute, it will apply to every State Party, even those that do not ratify the amendment, once seven-eighths of the State Parties ratify it. *Id.* art. 121(4).

intent not to be bound by its rulings, may be bound by more stringent and objectionable rules than State Parties, which were willing to assent to the court's authority.²³³

4. Financial

The ICC's operations are funded mostly by the assessed contributions of State Parties,²³⁴ which follow in scale their assessed contributions to the U.N. budget adjusted to reflect the difference in membership between the ICC and the U.N.²³⁵ This allows the ICC's funding sources to be sufficiently disaggregated so that no one source can use the power of the purse to influence the tribunal or, more specifically, ICC judges. As a further protection against the potential influence of large contributors, the ICC may also receive funds from the U.N., if approved by the General Assembly,²³⁶ although the most recent audit reveals no contributions from the U.N.²³⁷ In addition, the court may receive voluntary contributions from any individual, or entity, including NGOs, corporations or governments.²³⁸

C. Internal Constraints

Internal constraints are those imposed by the court itself; its rules of operation; or, more broadly, the norms of the professional, legal, judicial, and political communities of which the judge is a part. Judges on the ICC face few internal constraints save the self-restraint that individual judges choose to exercise.

²³³ This peculiar rule creates a perverse incentive on the part of the court to issue offensive rulings in order to cause the State Parties to amend the Rome Statute to override those rulings. This would result in two Rome Statutes: one more stringent that applies to non-State Parties and the other less stringent that applies to State Parties. Non-State Parties would then have a greater incentive to join the court, thereby getting the benefit of the less stringent amendments. The expanded court would thus expand the ICC's power. Although this outcome is possible, it seems unlikely. It requires the court to maintain and expand its influence while issuing rulings with which at least seven-eighths of the State Parties disagree. The issuance of such rulings is likely to cause significant dissent among the State Parties, resulting in either their withdrawal or disregard of the court's rulings.

²³⁴ See *Official Records*, ICC Assembly of State Parties, 4th Sess., at 253, ICC-ASP/4/32 (2005). See also Rome Statute, *supra* note 3, art. 115(a).

²³⁵ *Official Records*, ICC Assembly of State Parties, *supra* note 234, ¶ 2.10.

²³⁶ Rome Statute, *supra* note 3, art. 115(b).

²³⁷ See *Official Records*, ICC Assembly of State Parties, *supra* note 234, at 233-298.

²³⁸ Rome Statute, *supra* note 3, art. 11g.

1. Punishing Judges through Non-Renewal, Removal, or Salary Reduction

The ability of states to punish judges for their rulings, either through non-renewal of a judge's term, removal, or reduction of a judge's salary, would greatly restrain judicial independence. Renewable terms and removal similarly condition a judge's continued service on state satisfaction with his rulings. In comparison, salary reduction is a less drastic sanction but would similarly reduce judicial independence.

ICC judges are mostly insulated from these constraints on judicial decisionmaking. ICC judges serve nine-year, non-renewable terms.²³⁹ This gives judges little reason to issue opinions in order to curry favor with State Parties for purposes of being retained. In addition, it is difficult to remove judges. Removal may only occur for cause, either because a judge has committed serious misconduct or a serious breach of the judge's duties²⁴⁰ or the judge is unable to perform his duties, presumably due to incapacity or death.²⁴¹ Moreover, removing an ICC judge requires significant consensus. Supermajorities of two-thirds of the judges and two-thirds of the State Parties must vote for removal.²⁴² Finally, the salaries of judges may not be reduced during their terms.²⁴³

2. Self-Restraint

ICC judges face few creational and external restraints, which accords them the potential to make policy. That potential, however, will be realized only if judges seek to exploit it. Judges may restrain themselves, and thereby limit judicial policymaking.

The ICC's nascence grants no data from which to surmise how it will act; however, international law generally has a poor and diminishing history of judicial restraint. As discussed previously, international law purports to be formed through state

²³⁹ *Id.* art. 36(9)(a). Not all of the first judges elected will serve nine-year terms. Of the first slate of judges, one-third of them will serve nine-year terms, one-third will serve six-year terms, and one-third will serve three-year terms. *Id.* art. 36(9)(b). This ensures that one-third of the judges are replaced every three years and, after the first six years of the court, all judges serve staggered nine-year terms (similar to how U.S. Senators serve staggered six-year terms).

²⁴⁰ *Id.* art. 46(1)(a).

²⁴¹ *Id.* art. 46(1)(b).

²⁴² *Id.* art. 46(2)(a).

²⁴³ *Id.* art. 49.

consent, evidenced by either assenting to a treaty, which results in conventional international law, or engaging in a course of conduct, which results in customary international law (provided *opinio juris* is present).²⁴⁴ However, the growing practice of judges progressing the law—specifically, by announcing new customary international law in the absence of state practice²⁴⁵—illustrates the lack of internal or self-restraint international judges have exercised in recent history and portend more of the same for the ICC.

3. The Professional Goals of ICC Judges

Most ICC judges will enter other employment when their ICC terms end, and their future employment desires could affect their rulings on the bench. For example, if an ICC judge wishes to be appointed to another position by his home state, he may align his rulings with that state's wants. Potential future jobs for ICC judges are numerous, though, and an ICC judge may also seek future employment with an employer whose interests do not align with those of the judge's state. That is, it may be that the desire to please future employers would have no additional influence on a judge than do the judge's own policy preferences. An ICC judge with numerous future employment prospects would select the job that appeals most to him, and that job would likely appeal to the judge, at least in part, based on the extent to which its duties and goals align with the judge's preferences. To put this theory in terms of causation, the desire to be attractive to a future employer does not cause a judge to rule a certain way. A judge's ideology causes him to issue certain rulings and those rulings also cause him to be attractive to future employers who have a similar ideology. Thus, the judge does not act to make himself more attractive to a future employer. The judge acts in pursuit of his ideological interests and that also attracts employers of similar interests.

If a judge's future employment aspirations affect his rulings, it is uncertain whether those aspirations (1) enable a state to affect (or constrain) the judge's rulings or

²⁴⁴ See *supra* section entitled "Inherent Subjectivity of International Law—The Potential for International Judicial Lawmaking."

²⁴⁵ See *supra* section entitled "Customary International Law."

(2) further reinforce the judge's inclination to rule in accord with his ideology. However, one of the model's assumptions—countries nominate judges that they believe share the countries' ideology²⁴⁶—makes this uncertainty irrelevant by equating the ideology of the state and the perceived ideology of the judge.

4. Controlling the Composition of the Bench

The extent to which a particular judge exercises self-restraint is a function of the viewpoint of that particular judge, specifically that judge's view of the role of the court. The court's governing structure allows states to exercise some control here through their power to select judges. Judges are popularly elected by State Parties.²⁴⁷ Thus, the extent to which the court is composed of judges who wish to progress or restrain the law is in the hands of the State Parties.

D. Summary

ICC judges face few constraints. The Rome Statue grants judges extensive independence leaving states the ability to restrain judges only indirectly. One such tactic is for states that disagree with a ruling of the court to withhold cooperation. Whereas this potentially allows a state whose cooperation the court requires for a trial to move forward to influence the court's rulings, most often this may have little constraining effect on a judge's ability to expand the law. It seems then that the constraint that has the greatest potential to be effective is self-restraint. It requires, however, judges to be elected to the bench who exercise such self-restraint, or who otherwise do not desire to progress the law.

²⁴⁶ See *infra* section entitled, "Key Assumptions" in Chapter Seven.

²⁴⁷ For a brief review of judicial elections, see *infra* section entitled "The Basics of Judicial Elections" in this Chapter. For a more detailed treatment of judicial elections, see *infra* sections entitled "Number of Judges and Timing of Elections" and "Simulating Elections" in Chapter Seven.

CHAPTER THREE: POLICY OPTIONS

This section discusses past and current U.S. policies to constrain the court to its proper bounds, how those policies have been and are ineffective, and proposes some future policies that center on attempting to address the largest determinant of the ICC's actions: the types of judges that occupy the ICC's bench.

I. Crafting the Governing Rules

The most opportune time to limit the ability of the court to engage in policy making and improperly intervene in state sovereignty was in the negotiations at Rome. The United States apparently understood this and attempted to restrain the court's potential breadth. U.S. delegates fought to contain the power of the prosecutor, enlarge the role of the Security Council, limit the ICC's jurisdiction over the nationals of non-State-Parties, and reduce the elasticity of the listed crimes.²⁴⁸ On every issue though, their positions were largely defeated. They won a victory with the insertion of references to the Elements of Crimes,²⁴⁹ but this proved illusory when most of the Elements of Crimes were drafted with no greater specificity than the substantive provisions they were intended to elucidate.²⁵⁰

II. Current U.S. Policies

A. Article 98 agreements

To guard against the risk the court poses to U.S. nationals and the associated risk that the court could improperly intervene in U.S. sovereignty or policy, since the drafting of the Rome Statute and the Elements of Crimes, the United States has pursued a near singular strategy: requesting and compelling states to sign bilateral "Article-98 agreements," which bind the United States and the other signatory state not to surrender each other's nationals to the ICC.²⁵¹ Neither Article 98 itself nor the eponymous

²⁴⁸ Mumford, *supra* note 36, at 174-89.

²⁴⁹ Lietzua, *supra* note 121, at 481.

²⁵⁰ See *supra* section entitled "Effect of the Elements of Crimes."

²⁵¹ Article 98 of the Rome Statute permits states to refuse to surrender an individual to the ICC if the surrender would violate an international agreement of the surrendering state. Rome Statute, *supra* note 3,

agreements limit the ICC's ability to investigate or prosecute a matter. They only limit the ability of the ICC to force a state to surrender nationals of other states.

U.S. efforts to capitalize on the protection Article 98 potentially provides have achieved small to moderate success. One hundred nations have signed Article-98 agreements;²⁵² however, those numbers belie their effect. Of those 100 nations, only 52 have been ratified or are otherwise in effect because they constitute executive agreements.²⁵³ The remaining 48 may have no legal effect. Moreover, of the 100 nations that have concluded agreements with the United States, only 44 are State Parties.²⁵⁴ Of the 44 State Parties that have signed Article-98 agreements, a mere 25 are in force through ratification or executive agreement.²⁵⁵ Even these scant numbers overstate their force. The nations that have concluded Article-98 agreements consist of weak and middling powers.²⁵⁶ No major powers have concluded (at least publicly) an agreement. Romania was the most consequential state to have done so, but soon after, the EU warned that such conduct would not aid Romania's bid for EU membership.²⁵⁷ That halted movement toward Romania ratifying the agreement, and, to date, it has not been

art. 98(2). Article 98(2) states: The Court may not proceed with a request for surrender which would require the requested State to act inconsistently with its obligations under international agreements pursuant to which the consent of a sending State is required to surrender a person of that State to the Court, unless the Court can first obtain the cooperation of the sending State for the giving of consent for the surrender.

²⁵² COALITION FOR THE INTERNATIONAL CRIMINAL COURT, COUNTRY POSITIONS ON BILATERAL IMMUNITY AGREEMENTS (CHRONOLOGICAL ARCHIVE) (2006) [hereinafter "COUNTRY POSITIONS ON BIA AGREEMENTS"], available at <http://www.iccnw.org/documents/USandICC/BIA.html> (last visited Feb. 28, 2006).

²⁵³ *Id.*

²⁵⁴ *Id.*

²⁵⁵ *Id.*

²⁵⁶ The United Kingdom has not signed an Article-98 agreement but has agreed to a side letter to an extradition treaty that appears to be the functional equivalent. *U.S.-U.K. Extradition Treaty*, FACT SHEET (Bureau of European and Eurasian Affairs, Department of State, Washington, D.C.), Aug 3, 2004, available at <http://www.state.gov/p/eur/rls/fs/34885.htm> (last visited Feb. 28, 2006). For that reason, the numbers in the text consider the United Kingdom as having signed an agreement that is in force. Nonetheless, it is telling that the United Kingdom refused to accede formally to an Article-98 agreement, has spoken out publicly about the United States' use of Article 98(2), and has voiced solidarity to the EU common position that is unfavorable to the U.S. Article-98 agreements. See *infra* text accompanying note 274.

²⁵⁷ *International Criminal Court Remains a Thorn in US-EU Ties*, AGENCE FRANCE PRESSE, June 25, 2003. See also, *EU Candidate Countries Defy US to Support International War Crimes Court*, AGENCE FRANCE PRESSE, June 24, 2003; *Candidates for European Union Express Support for International Criminal Court*, A.P. WORLDSTREAM, June 24, 2003.

ratified.²⁵⁸ Appendix A contains a table displaying which countries have signed Article-98 agreements and in which countries those agreements are in force.

B. Congressional Action

Congress has aided the attempts to convince states to sign Article-98 agreements through two pieces of legislation: the American Servicemembers Protection Act²⁵⁹ (ASPA) and the Nethercutt Amendment.²⁶⁰

1. American Servicemembers Protection Act

The core provision of the ASPA prohibits military assistance to ICC State Parties,²⁶¹ but the President may waive the prohibition for countries that have signed an Article-98 agreement, which he routinely has done.²⁶² The ASPA exempts several countries from the prohibition: NATO member countries, major non-NATO allies (including Australia, Egypt, Israel, Japan, Jordan, Argentina, the Republic of Korea, and New Zealand), and Taiwan.²⁶³ In addition, “[t]he President may . . . waive the prohibition . . . with respect to a particular country if he determines and reports to the appropriate congressional committees that it is important to the national interest of the United States to waive such prohibition.”²⁶⁴ Thus, the ASPA permits the President (and indeed requires the President unless it is in the national interest to do otherwise) to punish ICC Party States that do not sign Article-98 agreements by cutting off military assistance funding. The ASPA contains other provisions, including one that has caused it to be referred to as “The Hague Invasion Act.”²⁶⁵ That provision authorizes the President to use “all means necessary and appropriate to bring about the release” of U.S. or certain allied

²⁵⁸ COUNTRY POSITIONS ON BIA AGREEMENTS, *supra* note 252.

²⁵⁹ American Servicemembers Protection Act of 2002, 22 U.S.C. § 7421 et seq.

²⁶⁰ Foreign Operations, Export Financing, and Related Programs Appropriations Act, 2006, Pub. L. No. 109-102, § 574, 119 Stat. 2229-30 (2005) [hereinafter “Foreign Operations Appropriations Act”].

²⁶¹ 22 U.S.C. § 7421(a).

²⁶² *Id.* § 7421(c).

²⁶³ *Id.* § 7421(d).

²⁶⁴ *Id.* § 7421(b).

²⁶⁵ See U.S.: “Hague Invasion Act” Becomes Law—White House Stops at Nothing in Campaign Against War Crimes Court, HUMAN RIGHTS WATCH NEWS, (Human Rights Watch, New York, N.Y.), Aug. 3, 2002, at [http:// www.hrw.org/press/2002/08/aspa080302.htm](http://www.hrw.org/press/2002/08/aspa080302.htm).

nationals being detained by the ICC.²⁶⁶ In addition, the ASPA prohibits cooperating with the court²⁶⁷ and requires the President to certify that the U.S. military personnel are not at risk of an ICC prosecution before participating in a U.N. peacekeeping or peace-enforcement operation (unless the President certifies that the national interest justifies participation).²⁶⁸ The table in Appendix A shows which countries have lost aid under the ASPA.

2. Nethercutt Amendment

Just as the ASPA conditioned the receipt of military aid to ICC Party States on their having signed Article-98 agreements, an amendment introduced by Rep. George R. Nethercutt to an appropriations bill similarly conditions the receipt of Economic Support Funds, a type of economic aid.²⁶⁹ The Nethercutt Amendment withholds funds from ICC Party States that have not signed Article-98 agreements unless the President waives the withholding, which he may do for a NATO member country, a major non-NATO ally (including Australia, Egypt, Israel, Japan, Jordan, Argentina, the Republic of Korea, and New Zealand), Taiwan, or any other country for which he determines “that it is important to the national interests . . . to waive such prohibition.”²⁷⁰

C. Effects of Current Policies

U.S. efforts to impel other states to sign Article-98 agreements, particularly the threats to withhold economic and military aid, has met with much enmity.²⁷¹ Forty-four countries have publicly rejected signing an Article-98 agreement, with many expressing sentiments similar to those of the Barbados ambassador to the Organization of American States, who said, “We will not change our principles for any amount of money. We're

²⁶⁶ 22 U.S.C. § 7427(a)-(b).

²⁶⁷ *Id.* § 7423.

²⁶⁸ *Id.* § 7424.

²⁶⁹ Colum Lynch, *Congress Seeks to Curb International Court; Measure Would Threaten Overseas Aid Cuts to Push Immunity for U.S. Troops*, WASH. POST., Nov. 26, 2004, at A1.

²⁷⁰ Foreign Operations Appropriations Act. § 574(b).

²⁷¹ See, e.g., Nicholas D. Kristof, *Schoolyard Bully Diplomacy*, N.Y. TIMES, Oct. 16, 2005, at 13; Juan Forero, *Bush's Aid Cuts on Court Issue Roil Neighbors*, N.Y. TIMES, Aug. 19 2005, at A1.

not going to belly up for \$300,000 in training funds.”²⁷² To date, 18 countries that had lost aid under the ASPA still refuse to sign an Article-98 agreement and the newly enacted Nethercutt Amendment threatens the aid of several more.²⁷³ The EU as a whole has effectively barred EU member states and states wishing to become EU members from signing and ratifying Article-98 through the adoption of the EU “Common Position” that lays out criteria an agreement must contain that are inapposite to the current agreements.²⁷⁴

Adding to the controversy surrounding Article-98 agreements, many NGOs and international scholars argue that the agreements are not enforceable or enforceable only with respect to the surrender of certain individuals.²⁷⁵ There are essentially three arguments that the agreements are incompatible with the Rome Statute and thus unenforceable: (1) Article 98 covers only agreements that existed at the time the Rome Statute was signed and does not cover subsequently concluded agreements; (2) Article 98 covers a narrower set of agreements than those proposed by the United States; (3) Article 98 covers only agreements that provide a guarantee of investigation or prosecution, which the U.S. agreements do not.²⁷⁶ The second argument appears to have the greatest chance of success and centers on claims that U.S. attempts regarding Article-98

²⁷² Forero, *supra* note 271.

²⁷³ COALITION FOR THE INTERNATIONAL CRIMINAL COURT, COUNTRIES OPPOSED TO SIGNING A US BILATERAL IMMUNITY AGREEMENT(BIA): US AID LOST IN FY04 & US AID THREATENED IN FY05 (2005) (listing countries that have lost aid); COUNTRY POSITIONS ON BIA AGREEMENTS, *supra* note 252 (listing countries that have signed Article-98 agreements).

²⁷⁴ *Council Common Position 2003/444/CFSP of 16 June 2003 on the International Criminal Court*, L150 OFFICIAL J. EUR. UNION 67 (2003) (incorporating GENERAL AFFAIRS AND EXTERNAL RELATIONS COUNCIL, INTERNATIONAL CRIMINAL COURT (ICC) - COUNCIL CONCLUSIONS (Sept. 30, 2003), available at http://europa.eu.int/comm/external_relations/human_rights/gac.htm#hr300902 (last visited Feb. 28, 2006)).

²⁷⁵ E.g., David Scheffer, *Article 98(2) of the Rome Statute: America's Original Intent*, 3 J. INT'L CRIM JUST. 333 (2005) (concluding that Article 98(2) only covers agreements that provide for non-surrender of a nation's military or official personnel and related civilian component); COALITION FOR THE INTERNATIONAL CRIMINAL COURT, US BILATERAL IMMUNITY OR SO-CALLED “ARTICLE-98” AGREEMENTS (2003) (arguing that the agreements contravene international law because they are contrary to the intention, language, and overall purpose of the Rome Statute); JAMES CRAWFORD ET AL., LAWYERS' COMMITTEE ON HUMAN RIGHTS AND THE MEDICAL FOUNDATION FOR THE CARE OF VICTIMS OF TORTURE, IN THE MATTER OF THE STATUTE OF THE INTERNATIONAL CRIMINAL COURT AND IN THE MATTER OF BILATERAL AGREEMENTS SOUGHT BY THE UNITED STATES UNDER ARTICLE 98(2) OF THE STATUTE ¶ 52 (2003) (assessing that the Rome Statute does not permit a State Party to enter into an agreement with a third-party state prohibiting the surrender of a person who was not sent abroad by the third-party state).

²⁷⁶ CRAWFORD ET AL., *supra* note 275, at ¶ 37.

agreements amount to securing impunity for U.S. nationals.²⁷⁷ Specifically, the argument is that Article-98 agreements may only cover a nation's military or official personnel and related civilian component, much like Status of Forces Agreements do, as opposed to all U.S. nationals including civilians not sent by the government to the receiving state.²⁷⁸

Ultimately, it will fall to the ICC to resolve the issue and decide on the enforceability of the agreements. This could occur through one of two processes. The first is envisaged in several interwoven provisions of the Rome Statute:

(1) In accordance with Article 89(1) of the Statute the Court will transmit to a State Party a request for the arrest and surrender of a person on the territory of that State Party;

(2) If the requested State Party considers that the request relates to a person who is covered by an agreement such that it may impede or prevent the execution of the request, it must (without delay) enter into consultations with the Court to resolve the matter, under Article 97 of the Statute;

(3) Article 97 consultations will take place between the State Party and the Court;

(4) The Court will then form a view as to whether or not it agrees with the view of the requested State Party; if it does so agree, it will not proceed with the request, as per Article 98(2) of the Statute; if it does not so agree, it will proceed with the Article 89(1) request;

(5) If the Court has proceeded and the requested State Party then fails to comply with the request under Article 89(1), so as to prevent the Court from exercising its functions and powers under the Statute, the Court may make a finding to that effect (Article 87(7));

(6) The finding of the Court is determinative (see Article 119(1), providing that any dispute concerning the judicial functions of the Court shall be settled by the decision of the Court);

²⁷⁷ *Id.* at ¶ 52.

²⁷⁸ *Id.*

(7) The Court may also refer the matter to the Assembly of States Parties (Article 87(7)); and

(8) The Assembly of States Parties will consider the question of non-cooperation (Article 112(2)(f)).²⁷⁹

The second process through which the ICC could rule on the enforceability of the U.S. Article-98 agreements does not occur in the context of a request for the surrender of a U.S. national, but rather could arise at any time. Article 119 gives the court the power to resolve any dispute involving the judicial functions of the court or any other dispute among State Parties concerning the interpretation of the statute.²⁸⁰ Either rationale could lead to the court taking up the issue.

If the agreements are not enforceable, then they have little effect. Suppose a Party State receives a request to surrender a U.S. national to the ICC. If the state refuses to surrender based on its Article-98 agreement, then the ICC would rule on the agreement's enforceability (if it had not done so already under Article 119). If the court rules (or already ruled) the agreement unenforceable, then the surrendering state must choose between complying with U.S. requests or complying with the ICC request, which the Rome Statute requires the state to do. This situation is no different than if the surrendering state had never signed an agreement and, upon an ICC request for surrender of a U.S. national, was faced with choosing between competing U.S. and ICC requests.

III. Potential U.S. Policies

A. Miscellaneous Policies

There is no shortage of potential policies to try to reduce the extent to which the ICC may issue rulings adverse to U.S. interests, but most of these policies do not primarily concern the ICC and have their own logic that justifies the extent to which they are implemented. Moreover, it does not appear that many of these policies would be effective in confining the court to its proper bounds. This section lists and discusses these policies and their potential effects.

²⁷⁹ *Id.* at ¶ 58.

²⁸⁰ Rome Statute, *supra* note 3, art. 119.

- Join the ICC

Joining the ICC has significant tradeoffs that may, on balance, reduce risk to U.S. nationals of an improper prosecution. The costs of joining the ICC are not insignificant. If the United States were to become a State Party, the ICC would always have personal jurisdiction over U.S. nationals.²⁸¹ This dramatically increases the class of cases by which the court may try U.S. nationals for political or rule-making purposes.

The benefit to joining the ICC is less certain. It may be that by joining the ICC, the United States would signal it does not believe it and its nationals are above the law, which may soften opposition to other U.S. proposals regarding the court, such as immunity for those serving on U.N. peacekeeping missions, and reduce the desire for countries to use the court to restrain U.S. power. Under this theory, although joining the court would increase the number of cases over which the Court would have jurisdiction over U.S. nationals, it would reduce the likelihood of an improper prosecution. This outcome, though, depends on the extent to which joining the court causes a tangible softening of opposition to U.S. proposals or desire to restrain U.S. power. However, desires to restrain U.S. power stem from the strength of U.S. power and the U.S.'s international policy (both its amount and type of engagement), which is unlikely to change based on whether the United States joins the ICC. Thus, there is little basis to conclude that joining the ICC would result in softening opposition to the United States.

An additional benefit of joining the court is that it would give the United States an official presence in the Assembly of State Parties, which carries with it an official voice in the court's operations. For example, the United States would be able to vote on proposed definitions for the crime of aggression and to nominate and vote for the court's judges. This would grant the United States more control over the court's operations than it currently exercises; however, the increase is negligible considering the United States

²⁸¹ See *supra* section entitled "Personal Jurisdiction Based on Nationality" for a discussion of how the ICC's jurisdiction depends in part on the nationality of the accused.

would be one voice among over 100. The official power the United States would have here is similar to the power it has in the General Assembly, which is little.²⁸²

- Alter where the United States operates and maintains forces

Operating forces in states that are party to the ICC entails an increased risk that such operations could form the basis of an investigation and prosecution.²⁸³ Maintaining forces in states that are parties to the ICC, and thus treaty bound to follow the ICC's rulings, entails an increased risk that such states may be bound to surrender U.S. nationals to the court. The United States could reduce its risk of improper prosecutions by operating and maintaining forces in other states.

It seems unrealistic, though, that ICC concerns will have anything more than a marginal impact on where the United States maintains and operates forces. These decisions have their own internal logic based on several factors more directly related to the effectiveness of training and operations. However, where alterations in the *situs* can be made that have little effect on training or operations but increasingly insulate the United States from the risk of an improper prosecution, those alterations should be explored. For example, some argue that the ICC has jurisdiction of U.S. nationals involved in certain aircraft operations over Iraq.²⁸⁴ Iraq is not an ICC State Party so it appears the ICC would not have jurisdiction based in the territory in which the act occurred. However, many bombers operated out of Diego Garcia, a territory of the United Kingdom, which is an ICC State Party. Although the aircraft release their ordnance over Iraq and any damage occurs in Iraq, a broad reading of jurisdiction may hold that the act can also be considered to have occurred in the location from which the aircraft departed. This conception of jurisdiction would probably require an expansion of the current law, but, as this Chapter discussed, such expansion is not unusual in

²⁸² The extent to which the United States obtains favorable results at the General Assembly is a result of its ability to cajole other nations to support its position, which is a function of the U.S.'s power and diplomatic ability as opposed to its official position as one of 191 members of the General Assembly.

²⁸³ See *supra* section entitled "Personal Jurisdiction—Who the Court May Try" for a discussion of how the ICC's jurisdiction depends in part on the territory on which the act occurred.

²⁸⁴ Press Release, Center for Constitutional Rights, "Shock and Awe" Could Lead to War Crimes Prosecutions Against U.S. Says International Human Rights Lawyers (March 21, 2003), at <http://www.ccr-ny.org/v2/newsroom/releases/pReleases.asp?ObjID=YSEdERQm7U&Content=216> (last visited March 2, 2006).

international tribunals. To avoid that risk would require operating aircraft from states not party to the ICC. Of course, the benefit of avoiding that risk would have to be evaluated against the increased costs of operating aircraft from the next-best location that is not on the territory of an ICC Party State.

- Alter operations

The risk to the United States is likely directly correlated with the effects of its operations. The less detrimental those effects are, the less risk the United States is likely to face. For example, more restrictive Rules of Engagement (ROE) would likely reduce collateral damage and with it both the desire and potential to use the ICC to prosecute U.S. nationals. However, the ROE and other, similar aspects of operations also have their own internal logic. ROE are written to reduce collateral damage while still enabling the mission to be accomplished, and the marginal increase in risk of an ICC prosecution due to the current ROE that otherwise are considered optimal is likely to be of little consideration.

- Refrain from participating in U.N. peacekeeping missions unless U.S. personnel are insulated from ICC prosecutions

Much like the other proposals above, decisions about whether to participate in a peacekeeping mission are based on their own merits. Presumably, the United States does so when it is in the United States' interests to do so. The added cost of the risk of an ICC prosecution emanating from a mission is likely to have little effect on that overall calculus. In addition, it seems that this policy is unlikely to be successful based on past experience. In the ICC's first two years of operation, the United States led the Security Council to pass resolutions preventing the ICC from investigating or prosecuting the personnel from any ICC non-Party State operating as part of a U.N. operation.²⁸⁵ The United States attempted to obtain another resolution in 2004 but the Security Council declined to issue one, and it appears that future resolutions are unlikely.

²⁸⁵ U.N. SCOR, 58th Sess., 4772nd mtg. at 1, U.N. Doc. S/Res/1487 (2003); U.N. SCOR, 57th Sess., 4572nd mtg. at 1, U.N. Doc. S/Res/1422 (2002).

B. Shape the Court by Affecting Judicial Elections

Each of the above listed policies seem unlikely to be implemented given the marginal effect ICC considerations have on those policies. Moreover, none address the critical issue and the fundamental uncertainty upon which the risk to the United States depends: how the court will act and the types of rulings it will issue.

Previous sections of this Chapter detail how the combination of the Rome Statute's elastic language and ICC judges' independence allow judges considerable latitude to make law and policy. Thus, how the court will rule depends on the predilections and beliefs of the judges who inhabit the court. This leads to the hypothesis that the court may be shaped by affecting the court's composition of judges.

1. The Basics of Judicial Elections

The ICC bench is to be composed of 18 judges²⁸⁶ elected by a two-thirds majority of State Parties.²⁸⁷ Each State Party may nominate one candidate, who may be a national of any State Party²⁸⁸ and who must have expertise in one of two fields: criminal law and procedure (List A judges) or "relevant areas of international law such as international humanitarian law and the law of human rights" (List B judges).²⁸⁹ At least nine judges and no more than 13 are to be elected from List A and at least five judges and no more than nine are to be elected from List B.²⁹⁰ There are also representation requirements

²⁸⁶ Rome Statute, *supra* note 3, art. 36(1).

²⁸⁷ *Id.* art. 36.

²⁸⁸ *Id.* art. 36(4).

²⁸⁹ *Id.* art. 36(3)(b).

²⁹⁰ *Id.* art. 36(5). The emphasis the Rome Statute places on having judges who specialize in humanitarian law (with a possible further specialization in violence against women or children) rather than the law of armed conflict or international law generally increases the likelihood that legal issues will be analyzed through the spectrum of human rights law and that human rights lawyers will be heavily represented among the judges. In short, it increases the likelihood that human rights law will dominate ICC activities and analysis. Given that human rights attorneys tend to be, and the field of human rights law tends to be dominated by, activists who seek the expansion and expanded application of human rights law in order to effect their desired policies, this will likely lead to judicial policymaking. Bruno Simma makes the point rather bluntly in arguing that human rights lawyers "apply less rigorous standards of legal analysis in order to support their desired policy positions." Wessel, *supra* note 101, at *36 (quoting Bruno Simma, *International Human Rights and General International Law: A Comparative Analysis*, in 4 COLLECTED COURSES OF THE ACADEMY OF EUROPEAN LAW 153, 164-66 (Academy of European Law ed., 1995)).

based on region,²⁹¹ gender,²⁹² and nationality in that no two judges may be nationals of the same state.²⁹³ Judges serve staggered nine-year terms with elections every three years.²⁹⁴ Each election cycle, six judges have their terms expire and six new judges are elected. Judges are elected by two-thirds majority of the State Parties.²⁹⁵

The elected judges select a President, and First and Second Vice President, by absolute majority, each of whom will serve a three-year term.²⁹⁶ After the elections, the Court organizes itself into a Pre-Trial Division, Trial Division, and Appeals Division.²⁹⁷ The Appeals division shall be composed of the President and four other judges.²⁹⁸ The Trial Division and Pre-Trial Division each shall be composed of at least six judges—one will have seven judges and the other will have six.²⁹⁹

2. Directly or Indirectly Affecting Elections

Affecting the selection of judges can occur either directly or indirectly. Directly affecting selection entails participating in the judicial nomination and election process, which is limited to State Parties. Indirectly affecting the court's judicial makeup entails attempting to influence who a country nominates and votes for. As a non-State Party, the United States may not directly affect the judicial body, but as a state that possesses a considerable amount of power, diplomatic or otherwise, the United States may have the ability to indirectly affect the court's judicial composition. Chapters Six and Seven model and explore the results of a strategy centered on affecting the court's judicial makeup by influencing State Parties, which directly participate in the judicial nomination and elections process.

²⁹¹ *Procedure for the Nomination and Election of Judges of the International Criminal Court*, ICC Assembly of State Parties, 3rd Sess., at ¶ 20, ICC-ASP/3/Res.6 (2004) [hereinafter "*Nomination and Election Procedure*"].

²⁹² *Id.*

²⁹³ Rome Statute, *supra* note 3, art. 36(7).

²⁹⁴ *Id.* art.36(9).

²⁹⁵ *Id.* art.36(6)(a).

²⁹⁶ *Id.* art. 38.

²⁹⁷ *Id.* art.39(1).

²⁹⁸ *Id.*

²⁹⁹ *Id.* Currently, the Pre-Trial Division is composed of the First Vice President and six other judges, and the Trial Division is composed of the Second Vice President and five other judges. International Criminal Court: Chambers, at <http://www.icc-cpi.int/organs/chambers.html> (last visited Oct. 2, 2005).

Of course, affecting the judicial nomination and election process is worth pursuing only if a judge's performance can be predicted based on information available before the judge assumes the bench. This is a testable hypothesis that Chapters Three, Four, and Five explore.

CHAPTER FOUR: THE THEORETICAL BASIS FOR JUDICIAL EMPIRICISM

I. Introduction

This Chapter discusses the main theories of judicial decisionmaking: the legal model and the various strains of judicial realism. The Chapter then presents past theoretical and empirical work explicating and establishing the efficacy of one particular model: the attitudinal model, which holds that judges issue opinions to effectuate their ideology. Next, the Chapter discusses flaws of the attitudinal model and presents a variant of the model, which this study employs, that retains the main characteristics of the model while discarding its flaws.

II. Models to Explain Judicial Behavior

Several models have been used to describe judicial decisionmaking, but they can be grouped into just two categories. One category consists solely of the legal model. The other contains multiple models of legal realism.

A. The Legal Model

Essentially, the legal model postulates that decisions are the result of judges merely applying the governing law—be it the constitution, a statute, or common law in the domestic arena, or a treaty or customary international law in the international arena—to the facts.³⁰⁰ Judge Harry Edwards of the D.C. Court of Appeals, in a repudiation of legal empiricism that purported to show that ideology often heavily influenced the decisions of judges from his court, succinctly stated the foundation of the legal model: “[I]t is the law—and not the personal politics of individual judges—that controls judicial decision making in most cases.”³⁰¹ Judge Edwards’s assertion was echoed by Judge Wald, who said, “[T]here is little time or inclination to infuse the decision making process with personal ideology.”³⁰² Understandably, it is judges who appear to be the

³⁰⁰ JEFFERY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL* REVISITED 48 (2002).

³⁰¹ Harry T. Edwards, *Public Misperceptions Concerning the “Politics” of Judging: Dispelling Some Myths About the D.C. Circuit*, 56 U. COLO. L. REV. 619, 620 (1985).

³⁰² Patricia M. Wald, *A Response to Tiller and Cross*, 99 COLUM. L. REV. 235, 237 (1999).

greatest defenders of the legal model and bristle at the contention that anything but the law, particularly their own predilections, are the basis of their decisions. However, even Edwards and Wald acknowledge that nonlegal factors affect Supreme Court decisions to a greater extent than decisions of lower courts, primarily because Supreme Court justices have fewer constraints than do lower court justices.³⁰³

B. Models of Legal Realism

Legal realism has many strands, but each seeks to discover the “real” explanatory factors for judges’ decisions.³⁰⁴ Three models that derive from legal realism have occupied much of judicial decisionmaking research in recent decades: behavioralism, the attitudinal model, and strategic voting (also known as the rational choice model).³⁰⁵ The behavioral model has not enjoyed the level of empirical support that the attitudinal model has,³⁰⁶ and most strategic voting models are based in part on the attitudinal model. As such, the attitudinal model predominates in the literature.³⁰⁷

1. Behavioralism

The behavioral model hypothesizes that social background or personal attributes affect judges’ decisions.³⁰⁸ Most empirical behavioral research, though, has failed to demonstrate the validity of the model, causing scholars to question its viability.³⁰⁹

³⁰³ SEGAL & SPAETH, *supra* note 300, at 49 n.15

³⁰⁴ Michael Heise, *The Past, Present, and Future of Empirical Legal Scholarship: Judicial Decision Making and the New Empiricism*, 2002 U. ILL. L. REV. 819, 833 (2002) (citing JOHN H. SCHLEGEL, *AMERICAN LEGAL REALISM AND EMPIRICAL SOCIAL SCIENCE* (1995); *AMERICAN LEGAL REALISM* (William W. Fisher, III et al. eds., 1993); LAURA KALMAN, *LEGAL REALISM AT YALE, 1927-1960* (1986); WILFRID E. RUMBLE, JR., *AMERICAN LEGAL REALISM: SKEPTICISM, REFORM, AND THE JUDICIAL PROCESS* (1968)).

³⁰⁵ *Id.*

³⁰⁶ *Id.*

³⁰⁷ *Id.*

³⁰⁸ *Id.*

³⁰⁹ *Id.* at 824 n.73 (citing Gregory C. Sisk et al., *Charting the Influences on the Judicial Mind: An Empirical Study of Judicial Reasoning*, 73 N.Y.U. L. REV. 1377, 1451-59 (1998) (finding neither gender nor race as a significant explanatory variable for judicial outcomes); Cassia Spohn, *The Sentencing Decisions of Black and White Judges: Expected and Unexpected Similarities*, 24 LAW & SOC'Y REV. 1197, 1211-14 (1990) (finding "remarkable similarities" in sentencing decisions of Black and White judges and concluding that judicial race has little predictive power); Susan Welch et al., *Do Black Judges Make a Difference?*, 32 AM. J. POL. SCI. 126, 131-35 (1988) (finding little impact of black judges in overall criminal sentencing severity, but some evidence of more equal treatment by black judges of white and

Empirical testing of behavioralism has had some success, but only in narrow cases when a personal characteristic logically would correlate with a certain disposition.³¹⁰ At best, the behavioral model has had "mixed results."³¹¹ At worst, it could be said that "A final

black defendants in decisions to incarcerate); Thomas G. Walker & Deborah J. Barrow, *The Diversification of the Federal Bench: Policy and Process Ramifications*, 47 J. POL. 596, 613-15 (1985) (finding marked similarity in decisionmaking records between black and white federal district judges in several fields and few differences between male and female judges, with the exception of a tendency of female judges to rule in favor of government entities); Peter J. Van Koppen & Jan Ten Kate, *Individual Differences in Judicial Behavior: Personal Characteristics and Private Law Decisionmaking*, 18 LAW & SOC'Y REV. 225, 225-41 (1984) (finding that Dutch judicial decisions in civil cases are only moderately influenced by the personality characteristics of the judge, measured by psychological tests through a questionnaire to judges participating in a simulation); Jon Gottschall, *Carter's Judicial Appointments: The Influence of Affirmative Action and Merit Selection on Voting on the U.S. Courts of Appeals*, 67 JUDICATURE 165, 171-73 (1983) (finding relative similarity between President Carter's male and female appointees to the courts of appeals and, with the exception of criminal cases, minimal variances between black and white judges, even in racial discrimination cases); John Gruhl et al., *Women as Policymakers: The Case of Trial Judges*, 25 AM. J. POL. SCI. 308, 319-20 (1981) (finding few significant differences in the conviction rates of male and female judges, although finding female judges more likely to sentence female convicts to prison); Thomas M. Uhlman, *Black Elite Decision Making: The Case of Trial Judges*, 22 AM. J. POL. SCI. 884, 891-94 (1978) (finding no important differences between black and white judges in criminal conviction rates and sentencing); Herbert M. Kritzer & Thomas M. Uhlman, *Sisterhood in the Courtroom: Sex of Judge and Defendant in Criminal Case Disposition*, SOC. SCI. J., Apr. 1977, at 77, 86 (concluding that female judges "behave no differently than their male colleagues" in study of sentencing); *But see* Sue Davis et al., *Voting Behavior and Gender on the U.S. Court of Appeals*, 77 JUDICATURE 129, 131-32 (1993) (noting that female judges were more supportive of plaintiffs in employment discrimination cases); Walker & Barrow, *supra*, at 604-11 (finding female judges more deferential than male judges to positions taken by the government in personal rights and economic regulation cases). *See generally* Orley Ashenfelter et al., *Politics and the Judiciary: The Influence of Judicial Background on Case Outcomes*, 24 J. LEGAL STUD. 257, 281 (1995) (concluding, in context of federal district court outcomes in civil rights cases, "that individual judge characteristics cannot be assumed to influence substantially the mass of cases"); Gerard S. Gyski & Eleanor C. Main, *Social Backgrounds as Predictors of Votes on State Courts of Last Resort: The Case of Sex Discrimination*, 39 W. POL. Q. 528, 528-29, 536 (1986) (describing the criticism of social background theory but concluding that the theory remains viable with significant limitations)).

³¹⁰ For example, one study showed that female judges were more sympathetic than male judges to plaintiffs in employment discrimination cases. Davis et al., *supra* note 309, at 131-32. Another study established that whether a judge had previously worked as a criminal defense attorney was predictive as to whether the judge would find the U.S. Sentencing Guidelines unconstitutional. Sisk et al., *supra* note 10, at 1470-73.

³¹¹ Heise, *supra* note 304, at 834 (citing Davis et al., *supra* note 309, at 130 (describing prior empirical research on behavior of women decision makers, including judges, as producing "mixed results"); Gruhl et al., *supra* note 309, at 311, 318 (describing studies using the judges' gender as an independent variable as yielding "mixed results"); Neal C. Tate & Roger Handberg, *Time Binding and Theory Building in Personal Attribute Models of Supreme Court Voting Behavior*, 1916-88, 35 AM. J. POL. SCI. 460, 470 (1991) (describing results of prior studies on the influence of prior judicial experience as "mixed"); S. Sidney Ulmer, *Are Social Background Models Time-Bound?*, 80 AM. POL. SCI. REV. 957 (1986) (describing prior research on social background influences upon judicial decision making as producing "mixed results"); Sheldon Goldman, *Voting Behavior on the United States Courts of Appeals Revisited*, 69 AM. POL. SCI. REV. 491, 496 (1975) (describing a multitude of prior studies on relationship of background variables to judicial voting behavior as having "mixed" results)).

inescapable conclusion about the explanatory power of the sociological background characteristics of [judges] is that they are generally not very helpful.”³¹²

2. The Attitudinal Model

a) The Theoretical Foundation of the Attitudinal Model

The model this study develops derives from the theoretical foundation of the attitudinal model. According to Jeffrey A. Segal and Harold J. Spaeth, two of the most prominent attitudinalists, “This model holds that the Supreme Court decides disputes in light of the facts of the case vis-à-vis the ideological attitudes and values of the justices.”³¹³ Essentially, strict attitudinalists believe that judges rule to effectuate their ideology and, much to the disagreement of adherents of the legal model, particularly judges, that the legal analysis the judge discusses in the opinion is pretextual and driven by the results the judge seeks.³¹⁴ Figure 4.1 displays an influence diagram illustrating this belief.

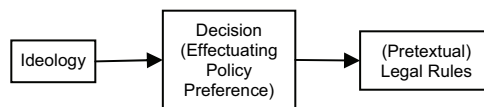


Figure 4.1:
Strict Attitudinalist View of the Effect of Ideology

The theoretical work of attitudinalists owes its foundation to Glendon Schubert, who postulated that judges (justices in the case of the Supreme Court) could be scaled according to their ideologies and cases could be scaled according to their stimuli.³¹⁵ For example, consider the justices on the U.S. Supreme Court. They could be scaled in ideological space ranging from the most liberal on the left to the most conservative on the

³¹² Heise, *supra* note 304, at 835 (quoting Dan Bowen, *The Explanation of Voting Behavior from Sociological Characteristics of Judges* (unpublished Ph.D. dissertation, Yale University, 1965), *quoted in* S. Sidney Ulmer, *Social Background as an Indicator to the Votes of Supreme Court Justices in Criminal Cases: 1947-1956 Terms*, 17 AM. J. POL. SCI. 622, 622 (1973)).

³¹³ SEGAL & SPAETH, *supra* note 300, at 86.

³¹⁴ *Id.* at 88.

³¹⁵ See SEGAL & SPAETH, *supra* note 300, at 89 discussing GLENDON SCHUBERT, *THE JUDICIAL MIND REVISITED* (1974) and GLENDON SCHUBERT, *THE JUDICIAL MIND* (1965).

right, which Figure 4.2 illustrates with nine points representing the nine justices spread over the spectrum. The literature typically refers to the position of the justices as their ideal points or *i*-points³¹⁶ (although Segal and Spaeth label them indifferent points because justices would be indifferent about ruling on one side or the other on cases that fall on their *i*-points).³¹⁷

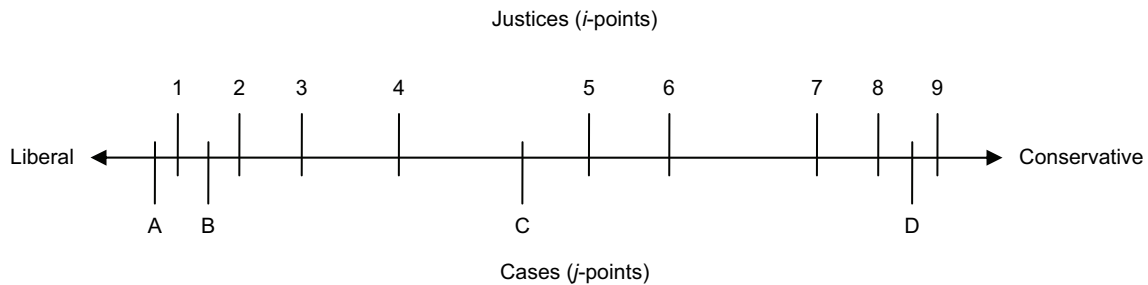


Figure 4.2:

Justices and Cases in Ideological Space

Cases could be placed along the same scale, as the letters indicate in Figure 4.2. The cases, though, are scaled somewhat differently in that there is no such concept as the liberalness or conservativeness of a case. There is only the liberalness or conservativeness of an outcome of a case, and cases have multiple possible outcomes. Most simply, there are two outcomes for each case that would come before the Supreme Court, one more conservative and the other more liberal. For example, in a case in which a criminal defendant has alleged the police conducted an unconstitutional search, the court could either rule the police conduct proper and the search constitutional (the conservative outcome) or it could rule the police conduct improper and the search unconstitutional (the liberal outcome). These two outcomes can be reduced to a single point in ideological space, which the literature refers to as a *j*-point, by finding the midpoint of the case's two possible outcomes.³¹⁸

³¹⁶ E.g., SEGAL & SPAETH, *supra* note 300, at 91. This view is discussed in greater detail and compared to a looser variant, which this study adopts, *infra* in text accompanying notes 321 to 327.

³¹⁷ *Id.*

³¹⁸ It could be argued that there are infinite outcomes because there are infinite rationales on which to rule a search constitutional or unconstitutional. For example, a search could be ruled constitutional for myriad reasons ranging from the broadest (most conservative), such as finding that the fourth amendment does not apply to the class of cases of which the subject case is a type, to the narrowest (least conservative),

The midpoint is used as a reference point because it demarks which way a judge will rule so that the outcome comes closest to the judge's ideal point. For simplicity of discussion, suppose that these ideological mappings produce certain outcomes in that a justice will vote either liberally or conservatively with a probability equal to 1 depending on the relative locations of the justice's *i*-point and the case's *j*-point.³¹⁹ If a judge's *i*-point is to the right (on the conservative side) of a case's *j*-point, the judge will choose the conservative outcome. If a judge's *i*-point is to the left (on the liberal side) of a case's *j*-point, the judge will choose the liberal outcome. Thus, Figure 4.2 shows that justice 2 will vote conservatively on case B but liberally on case C.

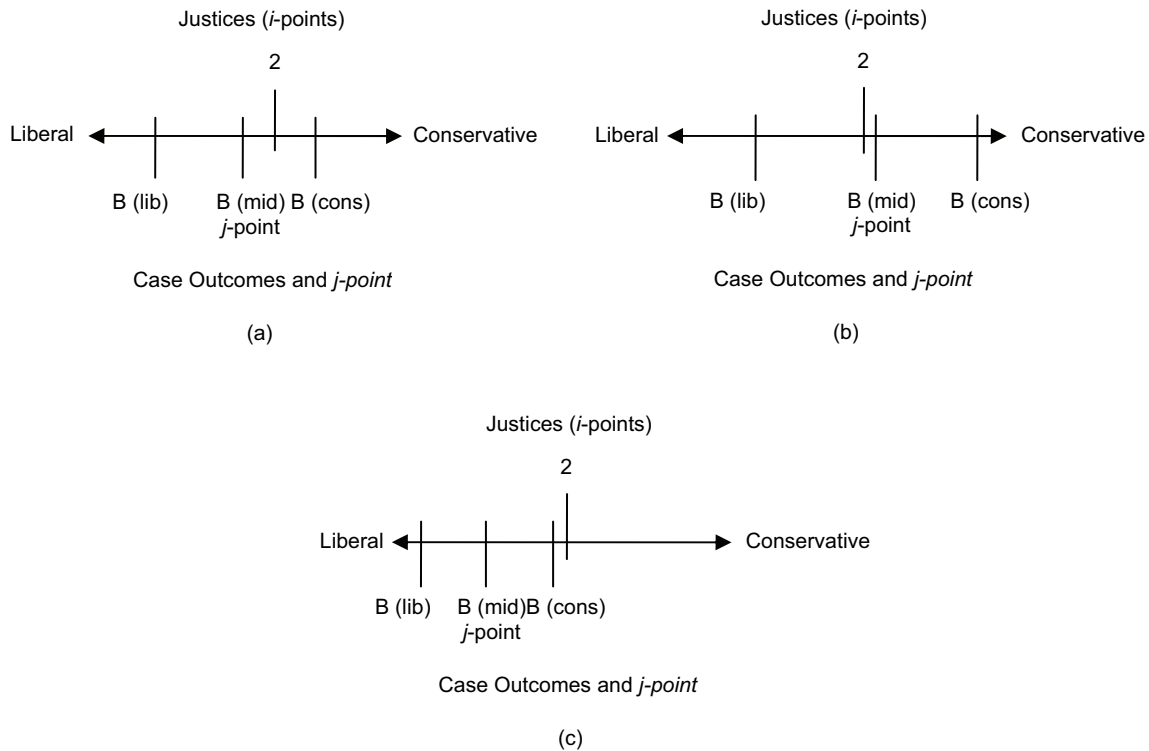
To understand why the *j*-point of case B represents the midpoint between the liberal and the conservative outcomes for case B, consider Figure 4.3, which contains zoomed-in versions of Figure 4.2 above that include only justice 2 and case B, with the addition of the liberal and conservative outcomes of case B placed in ideological space. In panel (a), the liberal ruling on case B is far to the left of justice 2's ideal point. This indicates that the liberal ruling is far more liberal than justice 2's ideology. The conservative ruling is slightly to the right of justice 2's ideal point. This indicates that the conservative ruling is slightly more conservative than justice 2's preferred outcome. Justice 2 must choose between the ruling that is far more liberal than he wishes and the ruling that is only slightly more conservative than he wishes. The attitudinal model posits that a justice will always choose the ruling that is closest to his preferred outcome, his ideal point. Plotting the midpoint of the possible rulings and applying the rule that the judge will vote conservatively if he is to the conservative side of the midpoint and liberally if he is to the liberal side of the midpoint ensures that.³²⁰ Because, in panel (a),

such as finding an exception to the warrant requirement that applies to the particular set of facts in the case. This possible range of outcomes does not change the nature of this analysis, that the possible outcomes will have a midpoint that can be mapped in ideological space.

³¹⁹ The mappings don't produce such certainty, a point which will be explored below and which does not diminish from the explanation as to why the case *j*-points represent the midpoint of the two possible case outcomes.

³²⁰ The attitudinal model does not account for uncertainty as to how a judge will rule. Regardless of how close the *i*-point is to the *j*-point, the judge rules to the side of the *i*-point with probability equal to 1. This study utilizes a looser version of the attitudinal model that allows for variations in uncertainty depending on the relative position of the *i*-point and the *j*-point, which is discussed later in this section.

the conservative ruling is closer to justice 2's ideal point than the liberal ruling is, justice 2's ideal point is to the right of the midpoint (*j*-point), which means justice 2 will vote conservatively.



Note: B (lib) = the liberal ruling on case B; B (cons) = the conservative ruling on case B; B (mid) = the midpoint of the liberal and conservative rulings on case B, which is case B's *j*-point.

Figure 4.3:
The Midpoints Explained

Examine panel (b) of Figure 4.3 in which the conservative outcome is now vastly more conservative. Now justice 2 must choose between a ruling that is far more liberal than his preferred ideology and a ruling that is even more conservative than his preferred ideology. He should choose the liberal ruling, as that is closer to his preferred ideology. Using the rule that references the case outcomes' midpoint (the *j*-point) produces that result. As can be seen in comparing panel (b) to panel (a), the conservative option becoming more conservative dragged the midpoint far enough right that it was to the right of justice 2's ideal point. Because justice 2's *i*-point is to the left of case's *j*-point, justice 2 will choose the liberal ruling.

Panel (c) shows one more variation. Here, both the conservative and liberal rulings are more liberal than the justice's preferred outcome as seen by his *i*-point. The

conservative ruling, though, is closer to his ideology, so the judge should rule conservatively. Using the rule comparing the *i*-point to the *j*-point produces this result, as the judge's *i*-point is to the right of the case's *j*-point.

b) A Looser Variant of the Attitudinal Model

Some of the assumptions underlying the attitudinal model differ slightly from the assumptions underlying this study. Those differences do not alter the analysis above, but they make it less rigid and somewhat more complex.

First, many proponents of the attitudinal model hold a dim view of the legal model and a cynical view of judging. For example, Segal and Spaeth argue that “the legal model and its components serve only to rationalize the Court’s decisions and to cloak the reality of the Court’s decisionmaking process.”³²¹ They recognize that judicial opinions are replete with citations to various legal rules and principles, but claim that “such rules merely rationalize decisions; they are not the causes of them.”³²² Likewise, David Rohde and Spaeth claim that judges are primarily concerned with effectuating their policy preferences. “[T]he primary goals of Supreme Court justices in the decisionmaking process are *policy goals*. Each member of the Court has preferences concerning the policy questions faced by the Court, and when the justices make decisions they want the outcomes to approximate as nearly as possible those policy preferences.”³²³

Many judges vigorously refute the notion that they seek solely to effectuate their policy preferences, or, indeed, that they do anything other than engage in often quite difficult inquiry to render the correct legal decisions in the cases before them.³²⁴ Other judges admit that ideology plays a role without going quite as far as succumbing to the notion that case decisions are the product of judges simply selecting their preferred outcome. For example, Judge Richard Posner of the Seventh Circuit Court of Appeals wrote, “Where the Constitution is unclear, judicial review is likely to be guided by the

³²¹ SEGAL & SPAETH, *supra* note 300, at 53.

³²² *Id.* at 88.

³²³ DAVID W. ROHDE & HAROLD J. SPAETH, SUPREME COURT DECISION MAKING 18 (1976) (emphasis in original).

³²⁴ For an example, see text accompanying notes 301 to 302.

political prejudices and the policy preferences of the judges rather than by the Constitution itself. The text is so old, and the controversies over its meaning are so charged with political significance, that constitutional ‘interpretation’ in doubtful cases (the only cases likely to be litigated) is bound to be creative and discretionary rather than constrained and interpretive.”³²⁵

Posner’s initial caveat, “Where the constitution is unclear,” is important, for a substantial percentage of the Supreme Court’s caseload results in unanimous opinions. In these cases, the constitution is clear (or at least clearer than in non-unanimous cases) and does not provide judges with as great an opportunity merely to effectuate their preferred policy.³²⁶

Moreover, although Posner’s statement posits a dichotomous situation—the constitution is clear or unclear—it is probably better described as falling along a spectrum ranging from unclear to clear. The clearer the manner in which constitution applies to the case at issue and the clearer the extent to which the constitution compels a certain result, the less ability there is for judges to allow their ideology to dictate their decisions. The more unclear the manner in which constitution applies to the case at issue or the extent to which the constitution compels a certain result, the greater ability there is for judges to allow their ideology to drive their rulings.

Finally, Posner’s conception of the role of ideology is not as strict as those of the attitudinalists discussed previously. Posner stated that judges are “*likely to be guided by*” their ideology.³²⁷ The terms “likely” and “guided by” present departures from, and a less cynical view of the job of judging claimed by, the strict attitudinal model, and they do so for different reasons.

³²⁵ Richard A. Posner, *Appeal and Consent*, THE NEW REPUBLIC, Aug. 16, 1999, at 36, 37. Judge Posner did not intend for this statement to be a scholarly comment or critique of the attitudinal model. Nonetheless, it provides a useful example of the difference in the views of strict attitudinalists and those who believe that ideology has an important, albeit less result-driven, impact on judicial decisionmaking.

³²⁶ Posner argued, however, that only the unclear cases get litigated, thus implying that every case that is litigated provides the ability for judges “to be guided by [their] political prejudices and the policy preferences.” *Id.*

³²⁷ *Id.* (emphasis added).

First, whereas strict attitudinalists claim that ideology *controls* a judge's decision, a looser conception of the attitudinal model claims that ideology merely *guides* a judge's decision. Figure 4.4 adds to Figure 4.1 and depicts influence diagrams showing the effect of ideology on judges' decisions under both the strict attitudinal model and a looser variant. Under the strict attitudinal model proffered by Spaeth and Segal, among others, a judge's ideology determines his decision. The judge rules to give effect to his policy preference. In explaining the decision, the judge will refer to legal rules and principles, but these are merely a pretext. A less cynical view of the job of judging holds that ideology plays a role in the judge's view of the law and his choice as to which legal principles govern. The judge then applies those legal rules to the facts to derive a decision. The difference between the two conceptions of the attitudinal model is that the strict view holds that judges choose the outcome. The looser variant holds that judges choose the means to derive an outcome. More often than not, the chosen means leads to the preferred outcome, but exceptions abound. Judges frequently rule in a manner counter to their policy preferences because the application of their preferred legal rules compels them to do so.

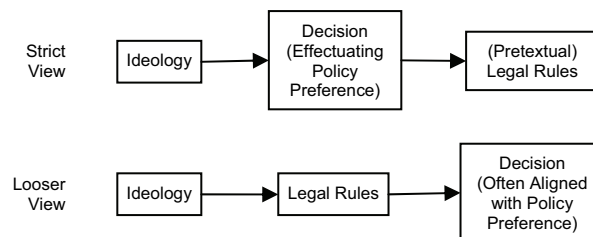


Figure 4.4:
Different Views of the Effect of Ideology

For example, conservatives generally prefer to employ some type of formalism, such as textualism or a form of originalism, to constitutional interpretation. Often, employing this legal rule or principle, which demands a narrow reading of the constitution, yields conservative results such as finding that Congress unconstitutionally exercised power not granted to it by Article I and thus reserved to the states or finding that the constitution does not provide some claimed individual right not enumerated in the constitution's text, such as the right to an abortion. In contrast, liberals generally

eschew formalism and prefer to interpret the constitution so that it reflects the changes that have taken place since the constitution was ratified and enforces the principles that underlie it, even if not contained in it. Often, employing this legal rule or principle, which entails an expansive view of the constitution, yields to liberal results, such as affirming broader congressional power and enforcing new constitutional rights, such as the right to an abortion.

This looser view of the attitudinal model does not invalidate it. The looser view of the model still hypothesizes that ideology is a determinate of outcome, even if not as directly as does the stricter view. Indeed, the looser view may do a better job of explaining some phenomena with which the strict attitudinal model may struggle, such as why judges occasionally rule counter to their preferred policy. In addition, the looser view of the attitudinal model allows for the uncertainty as to how a judge will rule that was discussed previously and depicted in Figure 4.4. Because a judge chooses legal principles that often but not always lead to his preferred outcome, there is some uncertainty as to how the judge will rule.

This leads to the difference between Posner's view and the strict attitudinal view that underlies his use of the term "likely." "Likely" is characterized by probability, not certainty. Schubert's model discussed above and depicted in Figure 4.2, which many attitudinalists have adopted, states that judges will vote according to their ideology such that they will choose the conservative or liberal outcome based on which is closer to their ideal point. The only uncertainty the model permits is when the liberal and conservative outcomes are equidistant from the judge's ideal point, which results in the judge's *i*-point and the case's *j*-point occupying the same point in space. In that case, the judge is indifferent about which decision to adopt. Put differently, the probability of choosing the liberal decision and the probability of choosing the conservative decision are each 0.5. If the *i*-point and *j*-point do not perfectly align however, the judge will choose whichever decision is closer to his ideal point with probability equal to 1.

It is more realistic to recognize that there will always be some nonzero probability of a judge choosing either the liberal or conservative decision. When the *i*-point and *j*-point align, the probability the judge will choose the conservative outcome is 0.5 and the probability the judge will choose the liberal outcome is 0.5. This situation is depicted in

panel (a) of Figure 4.5. When the j -point is just off to the side of the i -point, the judge is close to being indifferent between voting liberally and voting conservatively. In panel (b) of Figure 4.5, the judge will vote conservatively with some probability slightly greater than 0.5 and will vote liberally with some probability slightly less than 0.5. As the judge's ideal point moves farther to the right from the case's j -point, the probability that the judge will choose the conservative decision grows and the probability that the judge will choose the liberal decision shrinks. An extreme case is depicted in panel (c), in which the judge's ideology is on the far right of the spectrum and the j -point is on the far left of the spectrum. There, the judge would vote conservatively with some probability close to 1 and would vote liberally with some probability close to 0.

A strict adherence to Schubert's model results in concluding that the judge in panel (b) and the judge in panel (c) will vote conservatively with certainty. Put differently, in both cases, the judge will vote conservatively with the same probability despite that in one situation the judge is close to being indifferent about whether to vote conservatively and in the other situation the judge could not be more certain about voting conservatively.

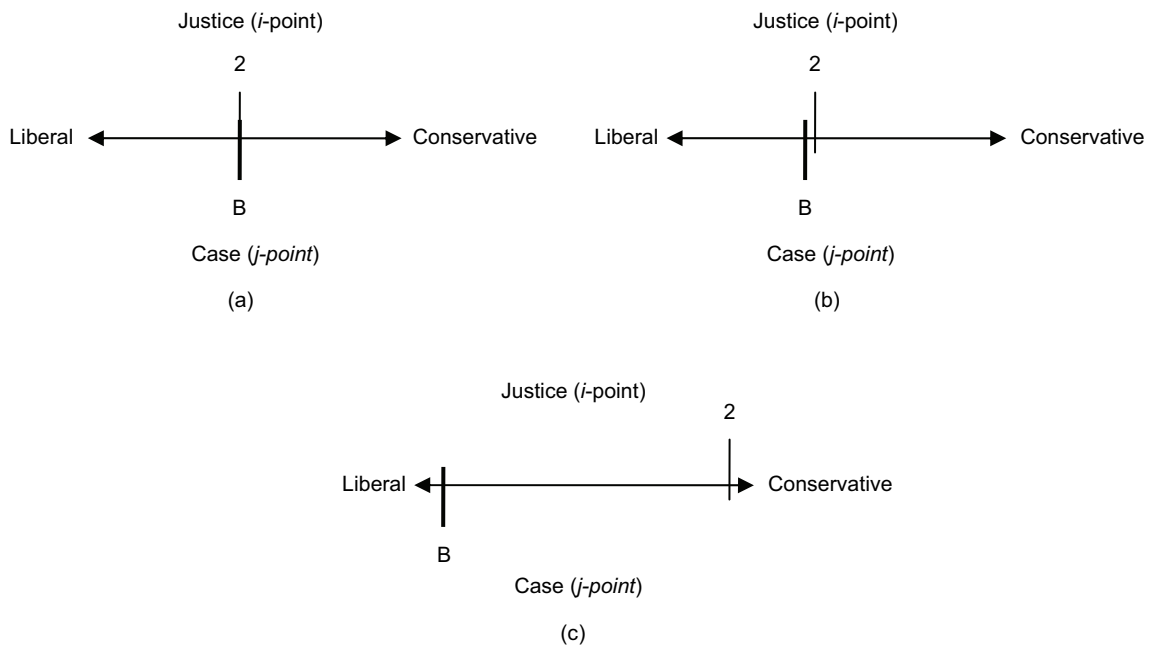


Figure 4.5:
Allowing for Uncertainty

It should be stated that the present study is not premised on the belief that ideology dictates all decisions to the exclusion of other factors, or even that ideology is paramount in judicial decisionmaking. The study recognizes that Supreme Court justices, like all judges, “are driven by a complex mix of factors—legal, ideological, and strategic.”³²⁸ That ideology is a good predictor, even if not the sole or even most important factor, of judicial decisionmaking is a sufficient basis for investigating whether strategies involving affecting judicial composition can affect court rulings, which this study investigates in Chapters Seven and Eight.

c) Criticisms of the Attitudinal Model’s Empirical Studies

Many empirical studies employing the attitudinal model have been criticized, and these criticisms generally fall into three categories. First, several studies suffer from a circularity problem in that a judge’s ideology is measured from his votes on the bench and the votes on the bench are used to evaluate whether the judge’s performance accords with his ideology.³²⁹ This study avoids the circularity problem by developing a measure of judicial ideology that is independent of a judge’s votes (and is based on information available before a judge assumed a seat on the bench).³³⁰ Second, the measure of judicial ideology that predominates in the literature has been criticized for being based on content too narrow to accurately capture a judge’s ideology. This study echoes those concerns, as well as levying others, and develops a measure based on broader content.³³¹ Third, some studies have been criticized for the empirical methodology they employed, typically by studies that are attempting to predict Supreme Court justices’ rulings based on their prior votes. The goal of many of these studies is not to discover whether judges’ votes are predictable based on what is known about the judge at the time he is nominated, which is this study’s goal, but to predict judges’ votes at any time before those votes occur. These studies, which often use some form of Bayesian updating, criticize other studies for using

³²⁸ Frank B. Cross & Blake J. Nelson, *Strategic Institutional Effects on Supreme Court Decisionmaking*, 95 NW. U. L. REV. 1437, 1437 (2001).

³²⁹ The circularity problem is discussed further *infra* in section entitled, “The Insufficiency of Measures Based on Votes” in Chapter Five.

³³⁰ See *infra* section entitled, “A New Measure of Ideology” in Chapter Five.

³³¹ See *infra* section entitled, “Problems with the Segal-Cover Scores” in Chapter Five.

time invariant predictors of judicial behavior.³³² The goals of this study, however, require it to use a time invariant predictor, specifically, a predictor based on information available when the judge was nominated.

3. Strategic Voting or Rational Choice Model

The strategic voting or rational choice model recognizes that the Supreme Court is one of several actors that affect policy outcomes, and posits that Supreme Court justices consider the reactions of other actors and vote strategically to accomplish their goals.³³³ Other actors include the President or Executive Branch generally, Senate, House of Representatives, and individual congressional committees. These models differ in the details, but they all generally assume that the Court will interpret legislation as close to the Court's (or the median justice's) ideal point as possible without having the ruling overturned by Congress.³³⁴ The strategic voting or rational choice model is inapplicable to this study because there are few other actors that can affect ICC policymaking. As discussed earlier, the international community has no executive or legislative branch. In addition, rulings of the ICC are difficult to overturn.³³⁵ Although ICC judges may be mindful of states whose cooperation is required for a successful investigation or prosecution,³³⁶ according to the strategic voting model, judges will nonetheless attempt to rule as close as possible to their ideal point.

³³² See, e.g., Andrew D. Martin & Kevin M. Quinn, *Dynamic Ideal Point Estimation via Markov Chain Monte Carlo for the U.S. Supreme Court, 1953-1999*, 10 POL. ANALYSIS 134 (2002).

³³³ The seminal work in this area was Brian A. Marks, *A Model of Judicial Influence on Congressional Policymaking: Grove City v. Bell*, Hoover Institution, working papers in Political Science, P-88-7.

³³⁴ SEGAL & SPAETH, *supra* note 300, at 105.

³³⁵ See *supra* section entitled "Alteration" in Chapter Two.

³³⁶ See *supra* section entitled "Noncompliance" in Chapter Two.

CHAPTER FIVE: USING THE ATTITUDINAL MODEL— STAGE ONE APPROACH AND METHODS

Much of the work involving the attitudinal model concentrates on establishing its validity, that is, that judges vote according to their ideology.³³⁷ Those results also support the looser version of the attitudinal model described earlier and depicted in Figure 4.4. This study's first technical stage builds off previous work on the attitudinal model and attempts to establish the extent to which an ICC judge's behavior can be predicted from what is known about his ideology before he assumes a seat on the bench. Ideally, conclusions about this would be based on data involving ICC judges and decisions; however, the ICC is nascent, having become a functioning entity only on July 1, 2002, and having begun operating only recently. Because sufficient data on the ICC does not yet exist, the present study must analogize to and use data from another tribunal.

This Chapter briefly reviews other international tribunals, explains why they make poor analogies for the ICC for the study's purposes, and discusses why data from the U.S. Supreme Court may be used. The Chapter then describes the model and variables the study uses to determine the extent to which judges' behavior on the bench can be predicted from their perceived ideology before they took the bench.

I. Finding a Source of Data: Analogizing to Other Tribunals

A. International Tribunals

Another international tribunal could potentially provide data, but all either analogize poorly, have too small a sample size to be of much use, or present problems with data availability. The International Court of Justice (ICJ) is the judicial arm of the United Nations.³³⁸ Parties before the ICJ are states, as opposed to individuals as is the case with the ICC, and judges do not enjoy a similar level of independence as do judges on the ICC. Although ICJ judges are nominally elected, some seats are controlled by

³³⁷ See generally SEGAL & SPAETH, *supra* note 300, at 312-26.

³³⁸ Statute of the International Court of Justice, June 26, 1945, art. 1.

powerful countries.³³⁹ Moreover, the judges serve renewable terms,³⁴⁰ which instills an incentive for judges to please those states in whose hands the decision about their renewal rests. In addition, states, either generally, in a treaty, or *ad hoc*, choose whether to submit cases to the ICJ.³⁴¹ That the tribunal's use depends on states willingly submitting to the court creates an extra-judicial incentive on the part of judges to please certain states, for example, those that judges believe may have greater cause to come before the tribunal in the future.³⁴² These extra-judicial incentives reduce the extent to which judges are free to implement their policy preferences and thus make the ICJ a poor analogy for the ICC. Even were the ICJ a good analogy for the ICC, small sample size—for most years, the ICJ hears only two to three cases per year³⁴³—prohibits its use.

Other international tribunals also analogize poorly to the ICC, primarily due to their lesser degree of judicial independence, which inhibits judges' ability to rule in a manner that accords with their ideology.³⁴⁴ In the European Court of Justice (ECJ), the European Court of Human Rights (ECHR), the International Criminal Tribunal for the former Yugoslavia (ICTY), and the International Criminal Tribunal for Rwanda (ICTR),

³³⁹ Since the ICJ's founding, the tradition has been for each of the five permanent member states of the United Nations Security Council to have a seat on the Court. The text of the Statute says nothing in this regard but that is the reality of power politics. The other ten members of the ICJ are then chosen, again not based on any wording in the Statute but on a long-standing, negotiated compromise that governs the mix of the U.N. Security Council as well, with three members from African states, two from Latin American states, two from Asian states, and three from European states (traditionally two from the West and one from the East of Europe).

Posner & Yoo, *supra* note 6, at 35 n.107 citing (Davis R. Robinson, *The Role of Politics in the Election and the Work of Judges of the International Court of Justice*, 97 AM. SOC'Y INT'L L. PROC. 277, 278 (2003)).

In contrast to ICJ "elections" the initial elections of ICC judges seem to have been true elections conducted without any standing agreements as to which judges would ascend to the bench. This distinction between the virtual appointment of ICJ judges and the election of ICC judges suggests that the former tribunal is a poor analogy for the latter.

³⁴⁰ Statute of the International Court of Justice, *supra* note 338, art. 13, ¶ 1.

³⁴¹ *Id.* arts. 36-37. "Generally" submitting cases to the court refers to the ICJ's compulsory jurisdiction regime in which states that consent to compulsory jurisdiction agree to submit to the ICJ all legal disputes with other states that have consented to compulsory jurisdiction.

³⁴² Posner & Yoo, *supra* note 6, at 36.

³⁴³ *Id.* at 37.

³⁴⁴ For a discussion about the independence ICC judges enjoy, see *supra* section entitled, "Judicial Independence."

judges have less independence due to their serving renewable terms.³⁴⁵ In addition, judges are appointed to the ECJ by common accord of the member states,³⁴⁶ parties to ECJ cases are states and state or inter-state bodies (e.g. parliament, the European Commission),³⁴⁷ and the ICTY and ICTR have a more limited mandate than the ICC³⁴⁸ and too small a sample size.³⁴⁹

B. The United States Supreme Court

The U.S. Supreme Court may provide a useful analogy to the ICC for the extent to which ICC judges will rule in accord with their ideologies, primarily due to their similar opportunities for judicial policymaking. Both tribunals are courts of last resort³⁵⁰ that issue rulings that are generally difficult to override outside of the judicial realm.³⁵¹

³⁴⁵ Registrar of the Court of Justice of the European Communities, The Court of Justice of the European Communities, at http://europa.eu.int/cj/en/instit/presentationfr/index_cje.htm (last visited March 4, 2006) (regarding the ECJ); Convention for the Protection of Human Rights and Fundamental Freedoms, art.23, ¶ 1 (regarding the ECHR); Registrar of the International Criminal Tribunal for the former Yugoslavia, Organs of the Tribunal, at <http://www.un.org/icty/glance-e/index.htm> (last visited March 4, 2006) (regarding the ICTY); Registrar of the International Criminal Tribunal for Rwanda, General Information, About the Tribunal, at <http://www.un.org/icty/glance-e/index.htm> (last visited March 4, 2006) (regarding the ICTR).

³⁴⁶ Registrar of the Court of Justice of the European Communities, *supra* note 345.

³⁴⁷ Posner & Yoo, *supra* note 6, at 58.

³⁴⁸ Each court was created by the Security Council to investigate and adjudicate only those crimes that occurred in their respective conflicts. The courts may not evaluate the use of force elsewhere and they may not decide on whether a state may resort to force. They are also limited in that, eventually, they will have investigated all the potential crimes in the former Yugoslavia and Rwanda over which they have jurisdiction. Their purpose will have been completed and they will cease to exist. To sum, the ICTs' operations were initiated by an outside body, the Security Council, and they are limited geographically, in subject matter, and temporally. In contrast, the ICC may initiate any investigation without first obtaining outside approval, casts a far wider, if not unlimited, geographic net, has a broader subject matter than the *ad hoc* ICTs, and has no known end date. Nonetheless, the tasks of ICTY and ICTR judges, and the types of rulings they may issue, are most analogous to that of ICC judges than are the other tribunals. Although the *ad hoc* ICTs' limited sample size makes them a poor source of data for statistical analysis, individual cases may make interesting case studies.

³⁴⁹ For summaries of each tribunal's jurisdiction, responsibility, and independence, see Posner & Yoo, *supra* note 6, at 34-40, 57-66.

³⁵⁰ The ICC is composed of three separate chambers: the Pre-Trial Chamber, the Trial Chamber, and the Appellate Chamber. Only the rulings of the Appellate Chamber are not reviewable by any other body.

³⁵¹ The difficulty of overriding an ICC ruling was discussed previously. See *supra* section entitled, "Alteration" in Chapter Two.

Broadly, Supreme Court decisions fall into two categories, those interpreting federal legislation and those interpreting the constitution, and overriding the latter is vastly more difficult than overriding the former. To override a Supreme Court decision interpreting federal legislation entails merely enacting a new law, which requires the assent of both houses of Congress (and possibly three-fifths of the Senate to

Both tribunals may hear cases across a breadth of issues of great public and political import, which provides tremendous opportunities for judges to effectuate their policy and political wishes through their rulings. Both tribunals are charged with interpreting law that is quite elastic.³⁵² Finally, the judges of both tribunals enjoy similar independence.³⁵³ These combinations of the elasticity of the law to be interpreted and judicial independence allows judges on both tribunals similar ability to effectuate their ideological views through their rulings, which makes the U.S. Supreme Court a useful data source for work on the ICC.

avoid a filibuster depending on whether the new legislation is presented to the Senate through a vehicle that can be filibustered) and the President or two-thirds of each house of Congress if the President dissents. In contrast, overriding a Supreme Court decision interpreting the constitution entails enacting a constitutional amendment, which requires the assent of two-thirds of each house of Congress in addition to three-fourths of the states. U.S. CONST. art. V. Amending the constitution is considerably difficult as evidenced by the infrequency with which it has occurred. In the nation's history, there have been only 27 amendments, of which the first ten, which compose the Bill of Rights, were accomplished just three years after the constitution was ratified. Thus, through the bulk of the nation's history, only 17 times did a proposal garner the consensus needed to amend the constitution. The difficulty of passing a constitutional amendment generally means that Congress is all but incapable of overriding the Supreme Court's constitutional pronouncements. Therefore, in both the ICC and the Supreme Court, the difficulty of overriding the court's rulings grants judges significant potential to engage in policymaking.

³⁵² Previous sections of this report discussed the elasticity of the Rome Statute's provisions. Although it is beyond the scope of this study to detail the issue, the elasticity of provisions the Supreme Court interprets is evidenced by the thousands of pages treatises and law review articles consume discussing and debating the meaning and effect of language of the constitutions and of many pieces of federal legislation. See *supra* section entitled "Ambiguity in the Rome Statute's Criminal Provisions."

³⁵³ Previous sections of this report discussed the independence of ICC judges. See *supra* section entitled "Judicial Independence." Supreme Court justices are likewise insulated from retribution for their rulings. The U.S. Constitution safeguards the independence of Supreme Court justices. All justices, like all Article III judges, enjoy lifetime tenure. U.S. CONST. art. III, §1; JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW §2.8 (4th ed. 1991). They can be removed only through impeachment for and conviction of treason, bribery, or other high crimes and misdemeanors. U.S. CONST. art. III, §1; U.S. CONST. art. II, §4; NOWAK & ROTUNDA, *supra* note 353. A judge's removal requires a majority vote from the members of the House of Representatives, U.S. CONST. art. I, §2 cl. 5, and a trial in the Senate followed by two-thirds of present senators voting for conviction. U.S. CONST. art. I, §3 cl. 6. The difficulty of removing judges, and thus their independence, is evidenced by the few incidents of judicial impeachment and conviction. In the history of the United States, only one Supreme Court justice and ten other federal judges have been impeached and tried. ELIZABETH B. BAZAN & MORTON ROSENBERG, CONGRESSIONAL OVERSIGHT OF JUDGES AND JUSTICES 21 (Cong. Research Serv., Order Code RL32935, 2005). Among them, seven of the judges (but not the Supreme Court justice) were convicted and removed from office. *Id.* Adding to the independence of Supreme Court justices, the constitution mandates that their salaries not be reduced while in office. U.S. CONST. art. III, §1. This combination of lifetime tenure, a difficult process for removing justices, and a guarantee that justices' salaries will not be diminished ensures substantial independence of Supreme Court Justices that is similar to the independence of ICC judges.

It must be emphasized, though, that, although the Supreme Court appears to be the best analogy, generalizing from it to the ICC has limitations. U.S. Supreme Court and ICC judges exist in different political environments with different histories and traditions, all of which may subtly, but powerfully, affect a judge's conception of his role and, thus, the judge's behavior. However, because the international community seems to take a more favorable view of judicial lawmaking than does the domestic community, and because the tradition and history of the U.S. Supreme Court instill justices with a reverence for the Court that tends to make them leery of overly politicizing it while the ICC has no such tradition and history, the degree of judicial lawmaking by the ICC may exceed that by the U.S. Supreme Court. Thus, generalizing from the U.S. Supreme Court may provide a lower bound of the extent to which ICC judges' rulings will follow their ideology.³⁵⁴

II. Empirically Assessing Judicial Behavior

The goal of this technical stage is to determine the extent to which a Supreme Court justice's performance aligns with his perceived pre-judicial ideology, to determine the demographic characteristics that increase or decrease this alignment, and to predict judicial performance based on information known about the judge before he assumed the bench. What follows in this Chapter is a description of the predictive model, specifically the variables and methodology, the study employs.

A. Independent Variables

This section discusses the independent variables the model uses to predict Supreme Court outcomes. The key independent variable is a measure of a judge's pre judicial ideology. Additional variables are included if theory suggests that they affect the extent to which a judge rules in accord with his ideology. These variables include the case's salience or importance, a judge's perceived ideology on the specific issue the case

³⁵⁴ One potentially critical difference between the independence of ICC judges and U.S. Supreme Court justices is that the latter enjoy lifetime tenure while the former will likely desire future employment when their ICC terms expire. This possibility, its effects, and how the model accounts for it is discussed *supra* in section entitled, "The Professional Goals of ICC Judges" in Chapter Two.

presents (which may also be thought of as a judge's personal issue-salience), and certain demographic characteristics.

1. Pre-Judicial Ideology

The study requires an independent measure of a judge's ideology based on information available contemporaneous to the judge assuming a seat on the bench. This section briefly discusses how most measures of judicial ideology do not measure *pre-judicial* ideology—they are based on judges' opinions after they assume the bench—and why those measures cannot be used in this study. The study then describes a measure of pre-judicial ideology, details its flaws, and presents a new measure that this study developed.

a) The Insufficiency of Measures Based on Votes

There has been an abundance of prior research attempting to measure Supreme Court justices' ideologies.³⁵⁵ Most of these measures, however, are based, at least in part, on how the justice has voted while on the Supreme Court.³⁵⁶ Such measures create a circularity problem. The model hypothesizes that ideology is a causal factor in how a judge votes. But the measure of ideology, which is purportedly a cause of votes, is being calculated by those votes it causes. To test the extent to which ideology causes, or at least can predict *ex ante*, judicial votes, the measure of ideology has to be derived independent of the votes. In addition, measures of ideology based on votes are unhelpful to this study because they do not allow a measure of a judge's ideology until after he has served on the court for a period of time. To be useful for policy, this study requires a measure of ideology that can be calculated before the judge attains a seat on the bench.

³⁵⁵ See, e.g., Andrew D. Martin & Kevin M. Quinn, *Dynamic Ideal Point Estimation via Markov Chain Monte Carlo for the U.S. Supreme Court, 1943-1999*, 10 POL. ANALYSIS 134 (2002); Jeffrey A. Segal & Albert D. Cover, *Ideological Values and the Votes of U.S. Supreme Court Justices*, 83 AM. POL. SCI. REV. 557, 559 (1989); ROHDE & SPAETH, *supra* note 323.

³⁵⁶ See, e.g., Martin & Quinn, *supra* note 355; ROHDE & SPAETH, *supra* note 323.

b) The Segal-Cover Scores

Segal and Cover created an ideology measure by performing a content analysis of editorials published in four of the nation's leading newspapers between when the President announced the nomination and the Senate confirmed the nominee.³⁵⁷ The four newspapers were selected so that two had editorial pages with a liberal stance (the *New York Times* and *Washington Post*) and two had editorial pages with a conservative stance (the *Los Angeles Times*³⁵⁸ and *Chicago Tribune*). A later study expanded upon this work by finding the ideological scores for additional justices.³⁵⁹ The studies revealed that the ideological scores were good predictors of justices' votes in civil liberties cases³⁶⁰—a category that includes cases involving criminal procedure, civil rights, the First Amendment, due process, and the right to privacy—but were not as good for predicting justices' votes in economic cases.³⁶¹ This was understandable considering that the editorials dealt almost exclusively with the justices' views towards civil liberties issues.³⁶² Despite the less than stellar performance of the scores in predicting votes on economic issues, the results were seen as providing exceptional support for the attitudinal model, and other researchers have widely adopted them.³⁶³

c) Problems with the Segal-Cover Scores

Despite their wide use among researchers, the Segal and Cover scores suffer from a few problems.

³⁵⁷ Segal & Cover, *supra* note 355.

³⁵⁸ That the *Los Angeles Times* has had a more liberal stance and the bias they may have introduced is discussed *infra* in this Chapter.

³⁵⁹ Jeffery A. Segal et. al., *Ideological Values and the Votes of U.S. Supreme Court Justices Revisited*, 57 J. POL. 812 (1995) [hereinafter Segal et. al., *Ideological Values Revisited*].

³⁶⁰ The scores were much worse predictors of the votes of Roosevelt and Truman appointees than they were of the votes of the other justices. *Id.* at 818.

³⁶¹ *Id.*

³⁶² Segal & Cover, *supra* note 355, at 561.

³⁶³ See, e.g., William Mishler & Reginald S. Sheehan, The Supreme Court as a Countermajoritarian Institution?, 87 AM. POL. SCI. REV. 87 (1993); Richard C. Kearney & Reginald S. Sheehan, *Supreme Court Decision Making: The Impact of Court Composition on State and Local Government Litigation*, 54 J. POLITICS 1008 (1992); Jeffrey A. Segal et al., A Spatial Model of Roll Call Voting: Senators, Constituents, Presidents, and Interest Groups in Supreme Court Confirmations, 36 AM. J. POL. SCI. 96 (1992); Reginald S. Sheehan et al., *Ideology, Status, and the Differential Success of Direct Parties before the Supreme Court*, 86 AM. POL. SCI. REV. 464 (1992).

(1) Problem of Narrow Content

In discussing the views of justices, the editorials tended to have a narrow focus. After the *Brown v. Board of Education*³⁶⁴ decision, editorials tended to concentrate on the nominees' stances on segregation and civil rights. During the Burger Court, editorials concentrated on the nominees' views on civil liberties verse police powers and civil rights. Late in the Burger Court and into the Rehnquist Court, the subjects of interest primarily became privacy rights and abortion. Because the editorials were narrowly focused, they are less predictable for cases generally than they are for cases involving issues that were the subject of the editorials: civil rights, civil liberties, and privacy rights.³⁶⁵

In addition, editorials are typically few in number and thus provide little information. Three justices' scores were derived from only two editorials. Of the 31 justices for whom the studies developed scores, only 11 were based on more than six editorials and the scores for six justices were based on three or fewer editorials. Moreover, many of the editorials report and reflect on the same issues, making them repetitive. This is likely due in part to the limited space that editorials are given. This space constraint necessarily limits content.

(2) Problem of Bias

Using opinion material, as the measures based on editorials do, is problematic. Opinions are inherently biased. Editorials from liberal newspapers will likely contain a liberal bias. That would tend to portray liberal justices as more moderate and conservative justices as more to the conservative extreme. Conversely, editorials from conservative newspapers will likely contain a conservative bias. That would tend to portray conservative justices as more moderate and liberal justices as more to the liberal extreme.

³⁶⁴ 349 U.S. 294 (1955).

³⁶⁵ Segal and Cover recognized that the editorial scores dealt "almost exclusively" with a nominee's stance on civil liberties and civil rights issues. Segal & Cover, *supra* note 355, at 561.

This problem may be mitigated by basing the measure on opinions from an equal number of conservative and liberal sources, which Segal and Cover attempted to do by using editorials from two liberal newspapers and two conservative newspapers. Despite their efforts, it is unlikely that their scores based on ideologically balanced sources.

First, whereas the *Los Angeles Times* was a conservative paper decades ago, in recent decades it has increasingly grown more liberal. As it has, this would tend to decrease the conservative bias and increase the liberal bias in the scores, resulting in a measure that colors conservatives as more conservative and liberals as more moderate. This problem could have been solved by replacing the *Los Angeles Times* with a newspaper whose editorial page was more reliably conservative throughout the relevant time period.

A second problem with the Segal and Cover scores is that the scores failed to weight the conservative and liberal newspapers so that each constituted half of the measure. Supreme Court nominations are a national story. Thus, newspapers that attempt to be national papers are more likely to run more editorials than other newspapers. The *New York Times* and to a lesser extent the *Washington Post* were and are national newspapers, or at least more nationally oriented than the *Los Angeles Times* and *Chicago Tribune*. It is likely that the more nationally oriented newspapers ran more editorials on a national story than more locally oriented papers. In addition, Supreme Court nominations are a local story in Washington D.C. Thus, the *Washington Post* may have run more editorials on the nomination than other papers. The foregoing makes it more likely that the liberal papers ran more editorials than the conservative papers, which would have the effect of increasing the liberal bias in the ideology measure. This problem could have been reduced by using a weighted average, with the liberal papers and the conservative papers each accounting for one-half of the average, instead of the simple average the scores employed. That may have been impossible however, given the sparse numbers of editorials written. As mentioned above, the scores for only 11 justices were based on more than six editorials and the scores for six justices were derived from three or fewer editorials. The scores for some justices were based on editorials from only conservative or only liberal newspapers, which would make it impossible to derive a weighted sample. In addition, for many justices, it appears that only one liberal or one

conservative newspaper published an editorial. Weighting the sample to allow one observation to count for half the score may not produce a reliable score. More generally, this small sample size appears to be a problem both because of the biases it produces and the lack of reliability inherent in basing measures on exceedingly small sample sizes.

d) A New Measure of Ideology

This study developed a measure of ideology to be used as a predictor for votes that has the benefits of the Segal Cover scores (independence of later votes cast and based on public knowledge available contemporaneous with a justice's nomination) but without their problems (derived from narrow content and prone to biases) by analyzing news articles. The measure was calculated using a content analysis similar to that used by Segal and Cover.³⁶⁶ References to a nominee's ideology were coded as *liberal*, *moderate-liberal*, *moderate*, *moderate-conservative* or *conservative*. Liberal statements include those describing the nominee's support for abortion, affirmative action, women and minorities in civil rights matters, the exercise of federal congressional power over the economy and other matters, and the individual over the government in privacy, criminal, or First Amendment cases. Conservative statements are those describing the nominee's support in the opposite direction. Moderate statements include those that explicitly describe the nominee or the nominee's views as moderate, and those that ascribe both liberal and conservative values to the nominee. Moderate-liberal and moderate-conservative statements include those that explicitly describe the nominee or the nominee's views as moderately liberal or moderately conservative, respectively, or similar conventions such as "relatively liberal"³⁶⁷ or "independent conservative."³⁶⁸ Liberal views are coded as 1, moderate liberal views as 0.5, moderate views as 0, moderate conservative views as -0.5, and conservative views as -1.³⁶⁹ The justice's

³⁶⁶ *Id.* at 559.

³⁶⁷ David E. Rosenbaum, *Nixon Said to Cut High Court List to Three Judges*, NEW YORK TIMES, Apr. 12, 1970, at 1.

³⁶⁸ John P. MacKenzie, *Blackmun: Independent Conservative*, WASHINGTON POST, Apr. 15, 1970, at A6.

³⁶⁹ On a number line, this places conservative views on the left and liberal views on the right, which is counter to the manner in which they are typically discussed. However, this follows previous empirical

ideology is measured by adding up all the coded references and dividing by the number of references:

$$\frac{-1(\# \text{ cons ref}) + -0.5(\# \text{ mod-cons ref}) + 0(\# \text{ mod ref}) + .05(\# \text{ mod lib ref}) + 1(\# \text{ lib ref})}{\text{total \#ref}} \quad (1)$$

This method produces a scale that ranges from –1 (unanimously conservative) to +1 (unanimously liberal).³⁷⁰

The study examined news articles from only the *New York Times* and *Washington Post*. These sources were selected because of their reputation as leading national newspapers and the likelihood that they would report comprehensively on Supreme Court nominations.³⁷¹ The study coded articles from each newspaper in order of the longest article to the shortest. The longer articles tended to be comprehensive exposés consisting of a few thousand words that would describe various aspects of the nominee, including his ideology. Articles that merely repeated already accounted for anecdotes or bases for labeling a judge as having a particular ideology were ignored.

Ignoring these repetitive references could bias the results, but including them could cause bias as well. Typically, an article might mention the prevailing opinion in passing—“The conservative nominee . . .”—or recount the same example of the judge’s

work in judicial decisionmaking and aligns with most of the judicial databases that code liberal votes as 1 and conservative votes as 0.

³⁷⁰ The method this study uses departs from that Segal and Cover employed in two respects. First, Segal and Cover coded every paragraph, but that method does not extend well to news articles. In news articles, there will often be an introductory statement describing the nominee as a conservative on a particular issue and then several paragraphs providing the facts that establish that conclusion. Every paragraph was not coded as conservative. Rather, there was only one notation of conservative for the point that was being made. When the article discussed another aspect of the nominee’s conservatism, another notation of conservatism was recorded. Additionally, sometimes a single paragraph would describe the nominee as liberal on one type of issue and conservative on another. For example, Blackmun was often described as conservative on criminal matters but liberal or moderate-liberal on civil rights. When this occurred, two scores were made, one for conservative (-1) and the other for liberal (1) or moderate-liberal (0.5).

This method also differs from Segal and Cover’s analysis by coding moderate-liberal and moderate-conservative references. Segal and Cover coded references only as liberal, moderate, or conservative. That limitation seems unnecessary and is difficult to work around considering the frequency with which a nominee or his views were described as moderate-liberal or moderate-conservative.

³⁷¹ Although both the *New York Times* and *Washington Post* maintain liberal editorial stances, for reasons discussed in the following section entitled “Use of News Articles versus Editorials,” this posed little problem of bias.

conservatism that has already been told. In contrast, there may be an article that questions the conventional wisdom by reporting on evidence of the nominee's moderation. Including the repeated example of the nominee's conservatism would give improper weight to a single data point and make the nominee appear more conservative but ignoring the repetition may give improper weight to the one or few contrarian examples of moderation. This study chose the latter route, which may tend to bias the results toward moderation. Nonetheless, as Table 5.1 reveals, the scores range across the ideological spectrum, suggesting that the bias toward moderation, to the extent it exists, is rather weak.

The news articles had no references to the perceived ideology of two justices: Harlan and Souter. Some articles noted that southern senators were opposed to Harlan because his grandfather, whilst a Supreme Court justice, had dissented from the court's upholding of school segregation. There was no indication either in fact or as reported, however, that Harlan held similar views. There was a similar absence of information about Justice Souter. It was speculated that he was a moderate conservative, but the only basis for the speculation was his having been nominated by a Republican at the suggestion of other Republicans from New Hampshire.

Justices who have no ideology score take on an ideology score of the President who nominated them. This approach is similar to other researchers who, in testing the attitudinal model on lower court judges, assign to judges some combination of ideological measures of the nominating President and the senators of the state in which the judge will preside that are from the same political party as the president.³⁷² Senators' ideological scores are considered because, in nominating lower court judges, presidents often grant courtesy if not deference to senators in whose state the judge will sit. Because such courtesy or deference does not typically apply when nominating Supreme Court justices, only the President's ideological scores will be used for those judges who had no identified ideology.

³⁷² Gregory C. Sisk & Michael Heise, *Judges and Ideology: Public and Academic Debates About Statistical Measures*, 99 NW. U. L. REV. 742, 787 (2005); Micheal Giles et al., *Picking Federal Judges: A Note on Policy and Partisan Selection Agendas*, 54 POL. RES. Q. 623 (2001).

As does past research, this study uses Poole's common space scores as a measure of the president's ideology.³⁷³ Thus, Justice Harlan takes on Eisenhower's common space score of -0.198 and Justice Souter takes on George H.W. Bush's common space score: -0.538.

Table 5.1 and Figure 5.1 displays the Segal-Cover scores and the general ideology scores this study developed (which is called general view, or *genview*). Panel (a) of Figure 5.1 graphs each judge's General Ideology score versus his or her Segal-Cover score (column 2 versus column 1 of Table 5.1) with a 45-degree line overlaid. Panel (b) of Figure 5.1 graphs the difference between the scores versus the Segal Cover scores (column 3 versus column 1 of Table 5.1). In both panels, the data point for a judge whose General Ideology score was more liberal than his Segal-Cover score appears above the orange line, whereas the data point for a judge whose General Ideology score was more conservative than his Segal-Cover score appears below the orange line. The table and graph reveal a few significant differences between the two measures—most notably for justices Blackmun and Harlan—but for 16 of the 23 justices, the measures are within 0.3 of each other. In addition, the correlation between the scores is 0.85.

³⁷³ Professors Keith Poole and Howard Rosenthal developed ideological scores for members of Congress by reducing legislative voting to a single ideological dimension. KEITH T. POOLE & HOWARD ROSENTHAL, CONGRESS: A POLITICAL-ECONOMIC HISTORY OF ROLL CALL VOTING (1997). Poole extended his work and derived what he labeled common space scores that are held constant through time. *Id.* Using a similar approach, Poole then formulated common space scores for presidents. These scores range from -1, indicating the most liberal, to +1 indicating the most conservative. Keith T. Poole, *Recovering a Basic Space from a Set of Issue Scales*, 42 AM. J. POLI. SCI. 954, 786-87 (1998). The above description of the common space scores was paraphrased from Sisk & Heise, *supra* note 372, at 786-87.

Because this study uses the negative numbers to indicate conservative views and positive numbers to indicate liberal views, this study will use the reciprocal of Poole's common space scores.

Table 5.1:
Justices' Ideology Scores

| Justices | Segal-Cover Scores | General Ideology* (genview) | Difference (genview - Segal-Cover) |
|-----------|--------------------|-----------------------------|------------------------------------|
| Black | 0.750 | 0.895 | 0.145 |
| Blackmun | -0.770 | -0.152 | 0.618 |
| Brennan | 1.000 | 0.850 | -0.150 |
| Breyer | -0.050 | 0.467 | 0.517 |
| Burger | -0.770 | -0.725 | 0.045 |
| B.White | 0.000 | 0.250 | 0.250 |
| Clark | 0.000 | -0.200 | -0.200 |
| Douglas | 0.460 | 1.000 | 0.540 |
| Fortas | 1.000 | 1.000 | 0.000 |
| Ginsburg | 0.360 | 0.620 | 0.260 |
| Goldberg | 0.500 | 1.000 | 0.500 |
| Harlan** | 0.750 | -0.198 | -0.948 |
| Kennedy | -0.270 | -0.522 | -0.252 |
| Marshall | 1.000 | 1.000 | 0.000 |
| O'Connor | -0.170 | -0.447 | -0.277 |
| Powell | -0.670 | -0.455 | 0.215 |
| Rehnquist | -0.910 | -1.000 | -0.090 |
| Scalia | -1.000 | -1.000 | 0.000 |
| Souter** | -0.340 | -0.538 | -0.198 |
| Stevens | -0.500 | 0.000 | 0.500 |
| Stewart | 0.500 | 0.000 | -0.500 |
| Thomas | -0.680 | -0.958 | -0.278 |
| Warren | 0.500 | 0.722 | 0.222 |

* Derived by author. The range is -1.00 (unanimously conservative) to 1.00 (unanimously liberal).

** No reliable information was found on the judge's ideology so the appointing President's common space scores were used.

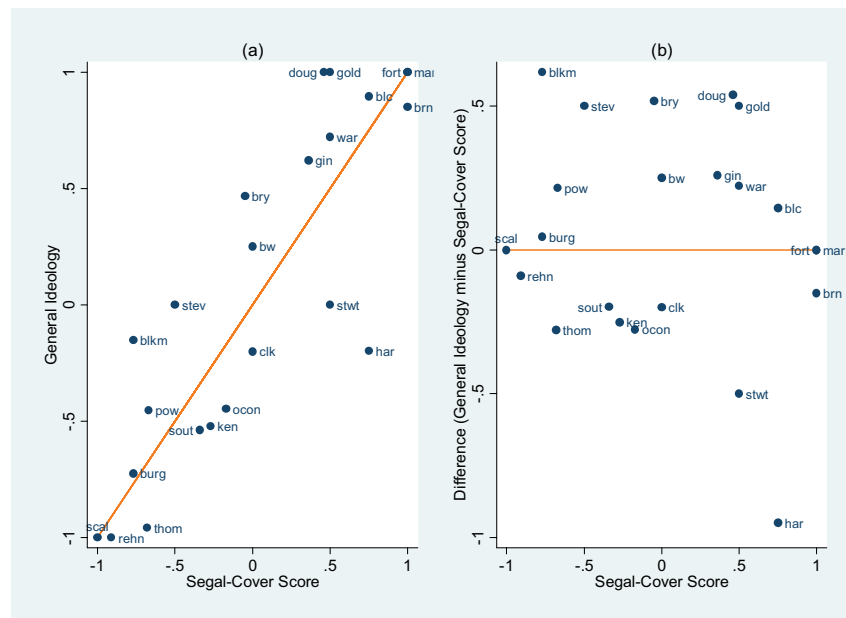


Figure 5.1:
Comparison of Justices' Ideology Scores

e) Use of News Articles versus Editorials

Using news articles as opposed to editorials resolves many of the problems editorials present that were discussed in the previous section. First, whereas editorials concentrate almost exclusively on civil liberties and civil rights issues, news articles tend to reflect more broadly on a nominee's ideology, in addition to reporting on specific issues about which the nominee might have a particular bent.³⁷⁴ News articles are not only more detailed but also more numerous than editorials. In addition, many are longer than editorials. Thus, they generate more data on which to base the judge's ideological score.

It should be noted that having canvassed reporting on judicial nominees throughout the last several decades, a noticeable bias—reporting conservatives as extremely conservative and reporting liberals as moderate—infiltrated the news pages in the *New York Times* and *Washington Post* in recent decades and has steadily increased. More generally, reporting on judicial nominees has changed, perhaps in line with the changes the confirmation process has undergone. In the 1970s and earlier, accounts of nominees consisted of neutral and impassive reporting. This fit the times, as the Senate's process for confirming nominees was concerned more about the nominees' qualifications than their ideology. Starting in the 1980s, as the confirmation process grew more heated and politicized, reporting changed. The tenor and content of news articles migrated from cold, neutral analysis to interested albeit subtle advocacy.

This was most striking in reading news accounts of Justice, then judge, Ginsburg when she was nominated. Justice Ginsburg had been a pioneer and champion of the women's rights movement and liberal causes generally as evidenced by, among other things, having been the general counsel of the ACLU and the first director of its Women's Rights Project. Yet, there was a sense in many articles that reporters were straining to cast her as a moderate or tinge her liberal views with a hue of moderateness, despite that in every specific issue an article discussed—individual rights, civil rights, affirmative action, abortion, and First Amendment issues—she was described as adhering

³⁷⁴ See *infra* section entitled "Specific Issue Ideology."

to the liberal view. Despite her known liberalness and past advocacy for liberal causes, her general ideology score was only 0.62, brought down mostly due to being labeled a moderate. Apparently, editorials were even more eager to describe her as a moderate, as her Segal-Cover score was only 0.36.

Overall, in comparing news articles from decades past to those of recent decades, one gets the sense that the job of reporting on nominees has changed from observer of a process to participant in a growing war. This trend seems to have escalated in the reporting on the most recent nominees to the Supreme Court: Chief Justice John Roberts and Justice Samuel Alito.

Whereas this reduction of neutral analysis regarding nominees makes it more difficult to use the regression results presented in the subsequent chapter to predict future supreme court judicial behavior from newspapers' analyses, it does not reduce its effectiveness in this study. The purpose of this stage of the analysis is to establish the extent to which a judge's ideology, as popularly known, predicts his later voting. The decrease in neutral analysis about nominees to the Supreme Court makes it more difficult to discover their popularly known ideology, hidden as it is in rhetoric attempting to paint the nominee as extreme or moderate depending on whether the issuer supports or opposes the nominee. It does not affect, however, the ability to discover the ideology of a nominee to the ICC.

This study argues that the similarities between the U.S. Supreme Court and the ICC allows some analysis about the former to be applied to the latter. The growing difficulty in uncovering what this study uses as a proxy for the independent variable is distinct from assessing the ideology of a potential ICC judicial nominee. The key independent variable here is ideology. This study uses newspaper accounts of a Supreme Court nominee's ideology as a proxy for the nominee's true ideology. Other methods would likely be used to assess a potential ICC judge's ideology on a scale from -1 to 1, including, perhaps, analyses based on primary source material, such as a nominee's prior speeches, writings, and work product. Given the increasingly biased nature of reporting on Supreme Court nominees though, those researchers who wish to use the regression results to predict a Supreme Court nominee's future behavior or for other Supreme Court

research would be well served by gathering news articles from newspapers with a broader range of ideological viewpoints.

f) Use of Primary versus Secondary Material

The ideology variables, both the general ideology variable already discussed and the specific-issue ideology variable discussed below, are based on newspaper accounts of the prospective justice's ideology along with the small sample of prior speeches, writings, and rulings the newspaper accounts contain. A better measure might derive from original sources as opposed to secondary sources such as newspaper articles. The former directly reflect a subject's views and leave it to the researcher to interpret. The latter, as does any secondary source, filter the original material so that the researcher is interpreting the journalist's interpretation of the subject. This additional degree of separation from the subject potentially adds errors and biases.

It is likely, however, that policymakers evaluating ICC judicial nominees will rely on similar sources: some combination of articles and a small sample of prior speeches, writings, and rulings. Thus, the *genview* measure generalizes well to that use. Moreover, if policymakers are able to generate a measure of ideology from primary source material, and that measure proves to be a better predictor than the *genview* measure, the latter would be a lower bound of the degree to which a judge's performance can be predicted based on ideology measured from primary sources.

2. Salience

A long line of research indicates that citizens may respond differently to issues that are salient to them than to issues that are not.³⁷⁵ As applied to the Supreme Court, researchers have tested an analogous hypothesis that justices may be more prone to rule in accordance with their ideology on cases that are particularly important or controversial.³⁷⁶ The question that arises is how to measure the importance or salience of a particular Supreme Court case.

³⁷⁵ See Lee Epstein and Jeffrey A. Segal, *Measuring Issue Salience*, 44 AM. J. POL. SCI. 66, 66 (2000).

³⁷⁶ *Id.*

There are two types of issue salience: retrospective salience and contemporaneous salience.³⁷⁷ Retrospective salience describes issues that are now considered salient regardless of whether the actors considered them salient at the time they acted on them.³⁷⁸ Contemporaneous salience describes issues that were considered salient at the time they were acted upon regardless of whether they would be considered salient now.³⁷⁹

The hypothesis is that Supreme Court justices are more apt to engage in policymaking, to give effect to their ideology, in cases that are salient. For a justice to act differently with regard to a case that is salient, the justice must know it is salient at the time the justice acts. Thus, testing the hypothesis requires a measure of contemporaneous salience, not retrospective salience. Measures of retrospective salience are relatively easy to come by. Canvassing treatises and texts on constitutional law yields numerous cases important enough to be presented in the treatise or text. Measuring contemporaneous salience is more difficult. The presence of a case in a treatise or text tells nothing about whether the justices knew of the case's importance at the time they ruled.

Epstein and Segal, recognizing the lack of measures of contemporaneous salience, developed a binary measure that this study utilizes.³⁸⁰ A case is coded as salient if (1) the *New York Times* carried a story about the case on the front page the day after the judgment was handed down, (2) it was the lead case in the story,³⁸¹ and (3) it was orally argued and decided with an opinion.³⁸²

³⁷⁷ *Id.* at 67.

³⁷⁸ *Id.*

³⁷⁹ *Id.*

³⁸⁰ *Id.*

³⁸¹ The Supreme Court often hands down multiple decisions on one day. If one of these cases is reported on the front page of the *New York Times*, often the others will be mentioned in the same article. The others, though, are not the reason for the story's placement on the front page. Thus, they are not considered salient according to the above criteria.

³⁸² *Id.* at 72. For more detail about this measure, including support for its validity, see *id.* at 73-77. Epstein and Segal note that a binary measure of salience is not ideal. *Id.* at 75-76 n.14. All cases that are considered salient are likely not equally salient. Some may be more important, more controversial, than others. Yet, by having a binary measure, all cases are considered equally salient. In addition, not all cases that are not considered salient are unimportant or uncontroversial. A case may have generated a lengthy article elsewhere in the paper, perhaps on page 2, but was not quite important enough to merit mention on the front page or was pushed off the front page by other monumental news. Such a case is considered equally unimportant as one that did not generate a story at all.

3. Specific-Issue Ideology

The Epstein-Segal measure of salience reflects whether a case is considered important or controversial at the time it is decided. It is probably true that most important or controversial cases have some personal salience for the justices, but it is almost certainly true that many cases that are not considered important or controversial and do not rate as salient under the Epstein-Segal measure are nonetheless salient to a particular judge.

The effect of ideology and personal issue-salience on judicial behavior can be captured through a variable that measures the ideology of judges on specific issues known to be of concern to them. As discussed earlier, one of the benefits of using news articles as compared to editorials to measure ideology is that news articles discuss more aspects of a judge's ideology and often report on specific issues about which the nominee might have a particular leaning.³⁸³ Using these reports, the study scored each nominee's ideology on those specific issues. This variable, called *spview*, was measured according to the same formula used to measure the general ideology variable (*genview*) discussed above. The specific-issue ideology measures are presented in Table 5.2.

Many of the issue areas listed in the table are lesser included categories of other issue areas. In the data, if a broader category is coded, the lesser included categories are coded as well. The table, which displays the known ideologies as reported in the press, does not reflect the nestings. For example, gender is a lesser included category of civil rights. Ginsburg has a 0.9 rating on civil rights, but her gender category is blank in the table. Because gender is a lesser included category of civil rights, in the data, Ginsburg has a 0.9 rating on gender issues (as well on all lesser included categories of civil rights).

A continuous variable that captured salience could remedy these concerns. Although it is beyond the scope of this study to generate such a variable, offering a suggestion that builds upon the Epstein-Segal measure may be helpful to other researchers. Specifically, one could generate a salience scale that is a function of article placement in the *New York Times* and article length (probably with reference to the average length of an article over some time period to account for variation in article length over time). This would yield a continuous variable which would allow more subtle sensitivity analyses as to how case importance impacts certain aspects of a decision including, but not limited to, judicial decisionmaking, assignment of majority opinion, unanimity, and polarization of the justices.

³⁸³ See *supra* text accompanying note 374.

The categories are nested as follows: abortion is a subset of privacy; affirmative action is a subset of civil rights; busing is a subset of desegregation; desegregation is a subset of equal rights; equal rights is a subset of civil rights; gender is a subset of civil rights; death penalty is a subset of criminal procedure; criminal procedure is a subset of criminal matters generally; individual rights is a combination of parts of criminal procedure, First Amendment and privacy issues; libel is a subset of First Amendment (speech).

As will be discussed in Chapter Six, although it is interesting to explore this variable, there are problems both incorporating it into the model and using it for predicting ICC judicial behavior, the latter because it is not clear how specific issues in international law nest into issue categories.

Table 5.2:
The Justice's Specific Issue Ideologies

| | abort | aff act | anti- trust | bus | church state | civil rights | civ rts in fed ct | crim gen | crim pro | death penalty | deseg | econ | enviro | equal rts | fed | first amend (spch) | gender | ind rts | labor- union | libel | priv |
|-----------|-------|------------|----------------|--------|-----------------|-----------------|-------------------------|-------------|-------------|------------------|-------|-------|--------|--------------|-------|--------------------------|--------|---------|-----------------|--------|--------|
| Black | - | - | - | - | - | - | - | - | - | - | - | 1.000 | - | - | 1.000 | - | - | - | 1.000 | - | - |
| Blackmun | - | - | - | - | - | 0.563 | - | -0.389 | - | - | - | - | - | - | - | - | - | - | - | - | - |
| Brennan | - | - | - | - | - | 1.000 | - | - | - | - | - | - | - | - | - | - | - | 1.000 | - | - | - |
| Breyer | - | - | - | - | - | - | - | - | - | - | - | - | 1.000 | - | - | - | - | - | - | - | - |
| Burger | - | - | - | - | - | - | 0.375 | -1.000 | - | - | - | - | - | - | - | - | - | - | - | - | - |
| B.White | - | - | - | - | - | - | - | - | - | - | - | - | - | - | - | - | - | - | - | - | - |
| Clark | - | - | 1.000 | - | - | -1.000 | - | - | - | - | - | - | - | - | - | - | - | - | - | - | - |
| Douglas | - | - | - | - | - | - | - | - | - | - | - | 1.000 | - | - | - | - | - | - | - | - | - |
| Fortas | - | - | - | - | - | - | - | - | 1.000 | - | - | - | - | - | - | - | - | - | - | - | - |
| Ginsburg | 1.000 | - | - | - | - | 0.900 | - | - | - | - | - | - | - | - | - | 1.000 | - | - | - | - | - |
| Goldberg | - | - | - | - | - | - | - | - | - | - | - | - | - | - | - | - | - | - | 1.000 | - | - |
| Harlan | - | - | - | - | - | - | - | - | - | - | - | - | - | - | - | - | - | - | - | - | - |
| Kennedy | - | - | - | - | - | - | - | - | -0.714 | - | - | - | - | - | - | 0.500 | - | - | - | - | - |
| Marshall | - | - | - | - | - | 1.000 | - | 1.000 | - | - | - | - | - | - | - | - | - | - | - | - | - |
| O'Connor | 0.000 | - | - | - | - | - | -1.000 | - | - | -1.000 | - | - | - | - | - | - | 0.333 | - | - | - | - |
| Powell | - | - | - | - | - | - | - | -1.000 | - | - | 0.125 | - | - | - | - | - | - | - | - | - | - |
| Rehnquist | - | - | - | - | - | -1.000 | - | -1.000 | - | - | - | - | - | - | - | - | - | - | - | - | - |
| Scalia | - | -1.000 | - | -1.000 | -1.000 | - | - | -1.000 | - | - | - | - | - | - | - | - | - | - | - | -1.000 | -1.000 |
| Souter | - | - | - | - | - | - | - | - | - | - | - | - | - | - | - | - | - | - | - | - | - |
| Stevens | - | - | - | - | - | - | - | - | - | - | - | - | - | - | - | - | - | - | - | - | - |
| Stewart | - | - | - | - | - | - | - | - | - | - | - | - | - | - | - | - | - | - | - | - | - |
| Thomas | - | -1.000 | - | - | - | - | - | - | - | - | - | - | - | -1.000 | - | - | - | - | - | - | -1.000 |
| Warren | - | - | - | - | - | 1.000 | - | - | - | - | - | - | - | - | - | - | - | - | - | - | - |

Notes: abort=abortion; aff act=affirmative action; bus=busing; civ rts in fed court=civil rights cases in federal court; crim gen=criminal matters generally; crim pro= criminal procedure (mostly Fourth, Fifth, Sixth, and Eighth Amendment issues and their progeny (e.g. Miranda)); deseg=desegregation; econ=economic matters; enviro=environmental issues; equal rts=equal rights; fed=federalism; first amend (spch)=First Amendment free speech issues; ind rts=individual rights; priv=privacy and unenumerated rights generally. Church state, civil rights, gender, labor-union, and libel are self-explanatory.

4. Demographic Variables

To better predict judicial behavior, the study also sought to examine whether judges with certain types of background characteristics are more likely than others to rule in accord with their ideology. Note the distinction between what behaviorism theorizes and what this study examines.³⁸⁴ Behaviorists claim that judges with certain demographic characteristics, such as gender or previous job type, are more likely to rule a certain way, either liberally or conservatively, *independent of their ideology*. For example, a typical behavioralist hypothesis is that women would be more likely to sustain civil rights suits or that former prosecutors are more likely to rule against criminal defendants. In contrast, this study examines whether judges with certain demographic characteristics are more likely to *follow their general ideology*, not whether they are more likely to rule in any set direction (e.g. liberally) independent of their general ideology.³⁸⁵

There are a couple of theoretical rationales that support the hypothesis that certain backgrounds correlate with whether judges are more likely to rule in accord with their perceived ideology. Some previous experiences force a person to think more about his positions on certain issues. This makes that person's positions more clear and likely less mutable. If a judge has already carefully considered an issue, perhaps in his prior career as a political appointee or in articles he published, he is more likely to retain his previously held view than he would if he had only considered the issue in passing. Another reason may be that certain background characteristics make ideology more apparent or more well-known. For example, people who frequently give speeches or publish their writings espouse their ideology and their views on specific issues. This causes their ideology to be measured with less error making it more likely that the judge will rule in accord with that measured ideology.

The following demographic characteristics were examined, all of which were coded as binary. Table 5.3 summarizes the codings.

³⁸⁴ See *supra* section entitled "Behavioralism."

³⁸⁵ In coding these variables for inclusion in the model, this means that each demographic variable is included as an interaction with the general ideology variable but not independently. See *infra* section entitled "The Model."

- **Politician – *pol*:** Justices were coded as having been politicians if they held elective office at the federal or state level.
- **Politically Active – *pact*:** Justices were coded as having been politically active if they had been actively involved in electoral politics at the state or federal level, active members of a political party (as compared with merely being registered as a party member), or actively involved with an organization that is politically active.
- **Political Appointee – *pap*:** Justices were coded as having been political appointees if they were appointed to a position in the president's administration.
- **Federal Judge – *fdj*:** Justices were coded as having been a federal judge if they had previously held that position.
- **State Judge – *stj*:** Justices were coded as having been a state judge if they had previously held that position.
- **Recent Private Practice – *rpp*:** Justices were coded as having recent private practice experience if they had been in private practice in the five years preceding their nomination.
- **Writings and Speeches – *wsp*:** Justices were coded as having delivered writings and speeches if they had given public speeches or published written work, external to their job, that expounded on their views. This excludes work product such as office memos and briefs to the court as well as judges' prior opinions.
- **Professor – *prf*:** Judges were coded as having been a professor if they had been a full-time law professor for at least two years at any point preceding their nomination.

Table 5.3:
Justices' Demographic Characteristics

| | Politician (<i>pol</i>) | Politically Active (<i>pact</i>) | Political Appointee (<i>pap</i>) | Federal Judge (<i>fdj</i>) | State Judge (<i>stj</i>) | Recent Private Practice (<i>rpp</i>) | Writings and Speeches (<i>wsp</i>) | Professor (<i>prf</i>) |
|-----------|------------------------------|--|--|------------------------------------|----------------------------------|---|---|-----------------------------|
| Black | 1 | 1 | 0 | 0 | 0 | 0 | 1 | 0 |
| Blackmun | 0 | 0 | 0 | 1 | 0 | 0 | 0 | 0 |
| Brennan | 0 | 0 | 0 | 0 | 1 | 0 | 1 | 0 |
| Breyer | 0 | 0 | 0 | 1 | 0 | 0 | 1 | 1 |
| Burger | 0 | 1 | 1 | 1 | 0 | 0 | 1 | 0 |
| B.White | 0 | 1 | 1 | 0 | 0 | 1 | 0 | 0 |
| Clark | 0 | 0 | 1 | 0 | 0 | 0 | 0 | 0 |
| Douglas | 0 | 1 | 1 | 0 | 0 | 0 | 1 | 1 |
| Fortas* | 0 | 1 | 1 | 0 | 0 | 1 | 0 | 0 |
| Ginsburg | 0 | 1 | 0 | 1 | 0 | 0 | 1 | 1 |
| Goldberg | 0 | 1 | 1 | 0 | 0 | 0 | 0 | 0 |
| Harlan | 0 | 0 | 0 | 1 | 0 | 1 | 0 | 0 |
| Kennedy | 0 | 0 | 0 | 1 | 0 | 0 | 1 | 0 |
| Marshall | 0 | 1 | 1 | 1 | 0 | 0 | 1 | 0 |
| O'Connor | 1 | 1 | 0 | 0 | 1 | 0 | 1 | 0 |
| Powell | 0 | 0 | 0 | 0 | 0 | 1 | 1 | 0 |
| Rehnquist | 0 | 1 | 1 | 0 | 0 | 0 | 1 | 0 |
| Scalia | 0 | 1 | 1 | 1 | 0 | 0 | 1 | 1 |
| Souter | 0 | 0 | 0 | 1 | 1 | 0 | 0 | 0 |
| Stevens | 0 | 0 | 0 | 1 | 0 | 0 | 0 | 0 |
| Stewart | 0 | 0 | 0 | 1 | 0 | 1 | 0 | 0 |
| Thomas | 0 | 1 | 1 | 1 | 0 | 0 | 1 | 0 |
| Warren | 1 | 1 | 0 | 0 | 0 | 0 | 1 | 0 |
| Totals | 3 | 13 | 10 | 12 | 3 | 5 | 14 | 4 |

*Fortas served as an unofficial advisor to President Johnson, and thus as a *de facto* political appointee. His coding above reflects his service if not his lack of official position.

5. Time

Time on the bench was not included as a variable affecting whether justices decide cases in accord with their pre-judicial ideology. For time to be an explanatory variable here, it would be necessary that justices' behavior (1) change over time (2) in some systematic manner that applies to all justices. First, the vast majority of past research has concluded that judicial behavior does not change over time.³⁸⁶ After surveying the field, one prominent researcher remarked, "Scholars of the Court are nearly unanimous in their response: The occasional anomaly notwithstanding, most jurists

³⁸⁶ Lee Epstein et al., *Do Political Preferences Change? A Longitudinal Study of U.S. Supreme Court Justices*, 60 J. POLITICS 801, 801 (citing Lawrence Baum, *Measuring Policy Change in the U.S. Supreme Court*, 82 AM. POL. SCI. REV. 905 (1988); SCHUBERT, *supra* note 315).

evince consistent voting behavior over the course of their careers.”³⁸⁷ Second, among those few studies that purport to find that judicial behavior changes throughout time, most do not find that judicial behavior changes in some universally systematic manner.³⁸⁸ For example, in a study of 16 justices who each served on the bench for ten or more years, Epstein et al. found that seven justices did not change over time, four changed linearly, two changed along a quadratic, and three changed according to a cubic.³⁸⁹ The researchers concluded that “time as a variable has no inherent theoretical meaning.”³⁹⁰ Thus, it appears that even for those justices whose behavior changes over time, the functional form by which it changes is randomly selected. Because models build from theories and past research has been unable to uncover a theory explaining how judicial behavior changes over time, thus confirming that such change is likely random, time will not be explicitly modeled and instead will be left in the random error term.

B. Weights

This section discusses how the model uses weights to control for issue variability among cases and the variable of judges’ tenure.

1. Weighting for Issue Variability

Cases differ in the issues they present such that a judge’s vote reveals a different amount about the judge’s behavior from case to case. For example, a case may arise in which the law is well settled but the lower court made a clear error, so the justices on the court all vote to reverse the lower court. In such a case, the votes of the justices reveal little about their ideology. Conversely, another case may arise that presents a better opportunity to assess the judge’s ideology. This study uses weights to control for issue variability.

Generally, issue change can be controlled for explicitly or implicitly. Explicitly controlling for issue variability entails including explanatory variables for case

³⁸⁷ *Id.*

³⁸⁸ *Id.* at 810-17.

³⁸⁹ *Id.* at 813-816.

³⁹⁰ *Id.*

characteristics. This is possible in studies investigating a particular type of case, such as Segal's work analyzing the Court's search and seizure cases,³⁹¹ but it is intractable when viewing cases generally. Another possibility is to use a fixed effects model that includes a dummy variable for every case. This study cannot use such a method because the results are to be used for out of sample prediction. The model cannot use any variables, such as specific Supreme Court case dummies, that do not generalize to the sample for which predictions are being generated. Predicting from a fixed effects model would require the presence of one of the fixed effects variables (in this example, a particular, already decided case) in the observation for which the prediction is being generated. Such a model cannot be used in making more general predictions.

Implicitly controlling for issue change entails inferring the change of issues from the votes themselves. Lawrence Baum created a measure to control for issue change by referring to the median change in percentage liberal votes from one term to another.³⁹² The median change is thought to represent the change in issues (relative difficulty of voting in a liberal or conservative fashion) from term to term.³⁹³ The median percentage is then subtracted from all justices' votes.³⁹⁴ This measure relies heavily on the change of one particular justice, the one who had the median change. Moreover, it can only be utilized on aggregated data. Baum's method cannot be operationalized on individual-level (or micro-level) data (where each justice's vote on each issue of each case is a single observation), which this study uses.³⁹⁵

This study controls for issue variability by weighting each justice's vote according to how much each case reveals about the ideology of each justice. For example, if the case is unanimous, it reveals nothing about the ideology of any justice, regardless of whether the unanimous vote was liberal or conservative. If the case is

³⁹¹ Jeffrey A. Segal, *Measuring Change on the Supreme Court: Examining Alternative Models*, 29 AM. J. POL. SCI. 461 (1985); Jeffrey A. Segal, *Predicting Supreme Court Cases Probabilistically: The Search and Seizure Cases, 1962-1981*, 78 AM. POL. SCI. REV. 891 (1984).

³⁹² Lawrence Baum, *Measuring Policy Change in the U.S. Supreme Court*, 82 AM. POL. SCI. REV. 905 (1988).

³⁹³ *Id.* at 907-08.

³⁹⁴ *Id.*

³⁹⁵ See *infra* section entitled "data."

nearly unanimous, it reveals little about the ideology of those in the majority and a great deal about those in the minority.

For an illustration, consider Figure 5.2, which is a variation of Figure 4.2 above. A case that results in a unanimous conservative ruling is represented by case A. The issues the case presents are so far to the side of the ideological spectrum that every justice votes conservatively. The *i*-point of each justice could fall anywhere within the dotted rectangle, which ranges from far on the liberal side of the spectrum to the most conservative point. Because of that, the *i*-point of any particular justice is difficult to locate. Thus, this case reveals virtually nothing about the ideology of the justices and is weighted accordingly. The converse situation is presented by case E, which results in a unanimous liberal ruling. In this situation, each justice's *i*-point would fall somewhere within the dashed rectangle. Again, this case reveals virtually nothing about the ideology of the justices and is weighted to reflect that.

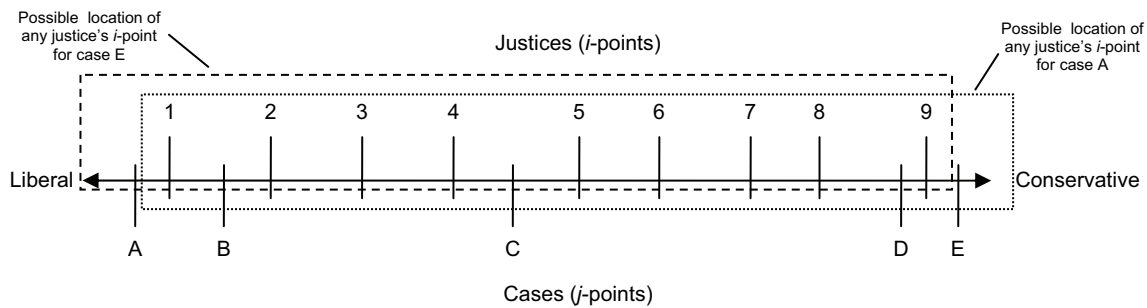


Figure 5.2:
Justices and Cases in Ideological Space: The Case of Unanimous Rulings

Compare the foregoing example to a case in which the decision is nearly unanimous, with eight justices voting one way and one justice dissenting, which is illustrated in Figure 5.3. Case B presents a situation in which eight justices (justices 2 through 9) vote conservatively and one justice dissents, voting liberally. In this situation, the justices in the majority have ideal points that could fall anywhere in the dotted rectangle, ranging from quite liberal to extremely conservative. This reveals little about the ideal points of these justices (although it reveals more than a unanimous case), and their votes should be weighted to reflect that. Conversely, the ideal point of the dissenting justice can fall along only a narrow portion of the spectrum. The justice who

dissents in this case must be very liberal. Thus, for this justice, the case is quite revealing of the justice's ideology and should be weighted highly to reflect that.

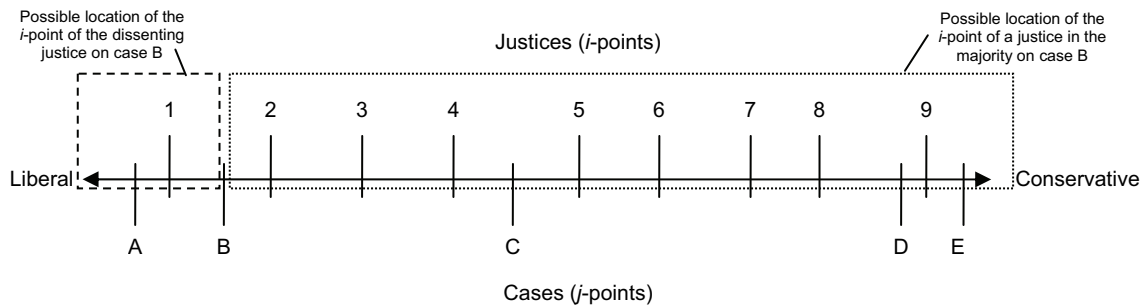


Figure 5.3:
Justices and Cases in Ideological Space: The Case of Near-Unanimous Rulings

In Figure 5.4, case D presents a situation converse to case B. In case D, eight justice (justices 1 through 8) vote liberally and one justice (justice 9) votes conservatively. This case tells very little about the ideology of the justices in the majority but reveals that the dissenting justice is quite conservative. Thus, the votes are given little weight for the justices in the majority and a lot of weight for the dissenting justice.

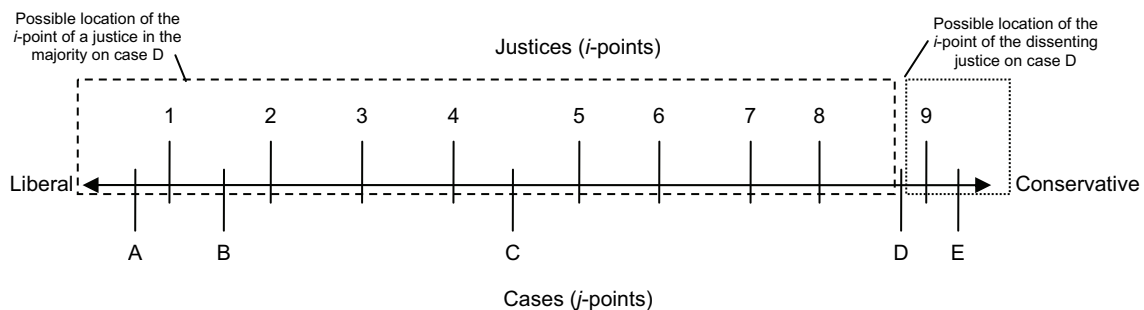


Figure 5.4:
Justices and Cases in Ideological Space: The Case of Near-Unanimous Rulings

Finally, consider case C in Figure 5.5, which illustrates a five-to-four decision on the conservative side. Here, the case reveals almost an equal amount about the justices that vote in the majority and those that vote in the minority.

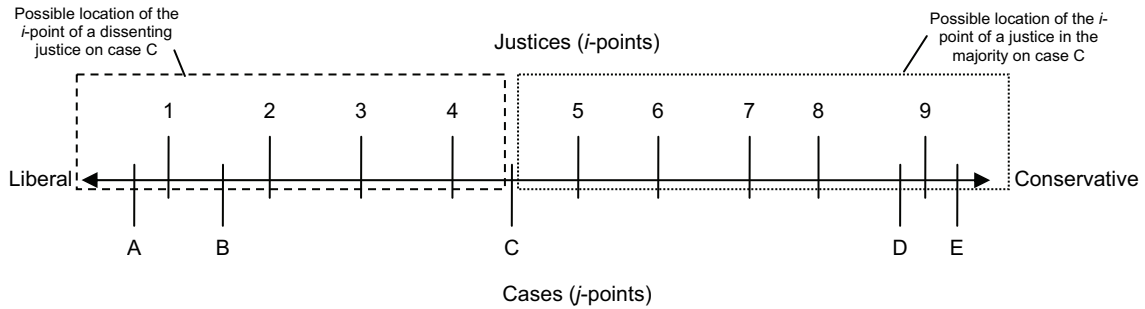


Figure 5.5:
Justices and Cases in Ideological Space: The Case of Split Rulings

To sum, the fewer votes a justice has aligned with his vote, the more the case reveals about that justice's vote. The more votes a justice has aligned with his vote, the less the case reveals about that justice's vote. Thus, the amount a case reveals about a justice's vote is proportional to the number of votes in the direction opposite the vote of that justice. A formula of weights was developed based on the reasoning above. Each justice's vote will be weighted by:

$$\frac{\text{\# of votes in the opposite direction}}{\text{\# of other votes}}. \quad (2)$$

"# of votes in the opposite direction" indicates the number of justices who voted differently than the justice whose vote is being weighted. "# of other votes" indicates the number of votes other than the vote of the justice whose vote is being weighted. Typically, nine justices vote on a case, so the denominator is eight. Occasionally, only eight justices will rule on a case. Very rarely, fewer than eight justices will rule on a matter. In a case in which all nine justices vote and a justice has his eight colleagues voting on the other side, as is the situation in cases B and D illustrated in Figures 5.3 and 5.4 respectively, there are eight votes in the opposite direction and 8 other votes. Thus, the dissenting justice's vote is weighted 1.0. For each justice in the majority, there is only one justice voting in the opposite direction and there are eight other votes. Thus, each justice in the majority has his vote weighted 0.125. Table 5.4 displays the weights in all contingencies in which nine justices vote. Columns one and two indicate the number of liberal votes and conservative votes respectively. Columns three and four respectively indicate the weights applied to those justices who voted liberally and those justices who voted conservatively.

Table 5.4:
Vote Weights When Nine Justices Vote

| Votes | | Weights | |
|-------|------|---------|-------|
| Lib | Cons | Lib | Cons |
| 9 | 0 | 0.000 | - |
| 8 | 1 | 0.125 | 1.000 |
| 7 | 2 | 0.250 | 0.875 |
| 6 | 3 | 0.375 | 0.750 |
| 5 | 4 | 0.500 | 0.625 |
| 4 | 5 | 0.625 | 0.500 |
| 3 | 6 | 0.750 | 0.375 |
| 2 | 7 | 0.875 | 0.250 |
| 1 | 8 | 1.000 | 0.125 |
| 0 | 9 | - | 0.000 |

Table 5.5 and Figure 5.6 (with a 45-degree line overlaid) display each justice's unweighted and weighted percentage liberal votes. The unweighted votes tends to make justices appear more moderate because each vote is counted equally, regardless of issues the case presents. For example, Justices Ginsburg and Breyer are members of the court's liberal block. The unweighted votes make both appear to be just on the liberal side of moderate. The weighted cases better reflect their judicial behavior. Similarly, Justices Scalia and Thomas are among the court's most conservative justices. The unweighted votes make them both appear to be on the moderate side of moderate-conservative.³⁹⁶

³⁹⁶ This assumes that a justice voting for the liberal outcome 50% of the time would be a moderate, a justice voting for the liberal outcome 25% of the time (halfway between always voting for the conservative outcome and voting as a moderate) would be a moderate-conservative, and a justice voting for the liberal outcome 75% of the time (halfway between always voting for the liberal outcome and voting as a moderate) would be a moderate-liberal.

Table 5.5:
Unweighted and Weighted Percent Liberal Votes

| Justices | % Liberal Votes (unweighted) | % Liberal Votes (weighted) |
|-----------|------------------------------------|----------------------------------|
| Black | 0.720 | 0.691 |
| Blackmun | 0.515 | 0.545 |
| Brennan | 0.709 | 0.830 |
| Breyer | 0.551 | 0.721 |
| Burger | 0.341 | 0.170 |
| B.White | 0.486 | 0.393 |
| Clark | 0.559 | 0.344 |
| Douglas | 0.813 | 0.850 |
| Fortas | 0.708 | 0.707 |
| Ginsburg | 0.581 | 0.795 |
| Goldberg | 0.759 | 0.657 |
| Harlan | 0.432 | 0.171 |
| Kennedy | 0.404 | 0.319 |
| Marshall | 0.717 | 0.880 |
| O'Connor | 0.386 | 0.293 |
| Powell | 0.395 | 0.295 |
| Rehnquist | 0.296 | 0.125 |
| Scalia | 0.336 | 0.192 |
| Souter | 0.558 | 0.722 |
| Stevens | 0.602 | 0.723 |
| Stewart | 0.503 | 0.369 |
| Thomas | 0.300 | 0.155 |
| Warren | 0.742 | 0.778 |

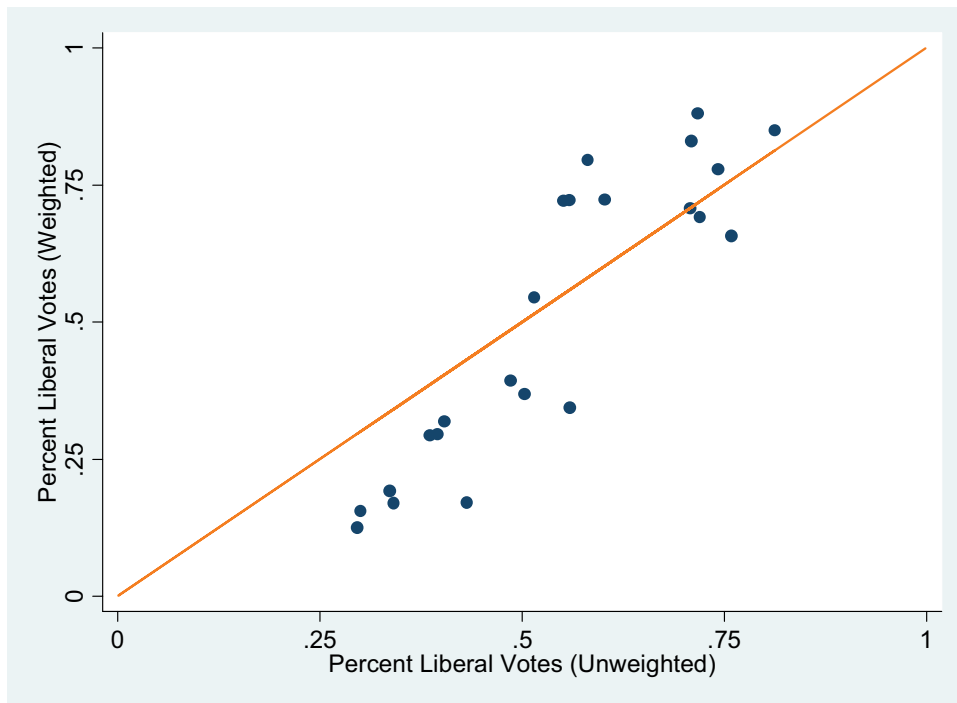


Figure 5.6:
Unweighted and Weighted Percent Liberal Votes

A comparison of the unweighted and weighted votes in a specific issue area is more telling. Table 5.6 displays the unweighted and weighted votes on abortion cases. As with the overall vote averages, the unweighted votes make Breyer and Ginsburg appear more moderate whereas the weighted totals better reflect their judicial behavior. The unweighted votes portray Souter as a pure moderate while the weighted totals accurately reflect that he tends to be on the liberal side of the issue. The unweighted votes portray O'Connor as a moderate conservative, whereas the weighted votes better reflect her behavior as a moderate on abortion.

A closer look at Breyer's votes is telling. Breyer voted on five abortion cases, two of which he voted conservatively. However, one of those was a unanimous case, which reveals nothing about his ideology, and the other was an eight-to-one decision with Breyer in the majority, which reveals almost nothing about his ideology. The weights account for this and better reflect the contribution these votes make to his overall judicial behavior. The foregoing lends support for the proposition that the weights perform well in controlling for case variability and more accurately reflecting justices' voting behavior.

Table 5.6:³⁹⁷
Unweighted and Weighted Percent Liberal Votes on Abortion Cases

| | % Liberal Votes on Abortion Cases | |
|-----------|--------------------------------------|----------|
| | Unweighted | Weighted |
| Breyer | 0.600 | 0.909 |
| <i>n</i> | 5 | 4 |
| Ginsburg | 0.714 | 0.929 |
| <i>n</i> | 7 | 5 |
| Kennedy | 0.125 | 0.083 |
| <i>n</i> | 16 | 12 |
| O'Connor | 0.400 | 0.483 |
| <i>n</i> | 20 | 16 |
| Rehnquist | 0.139 | 0.090 |
| <i>n</i> | 36 | 29 |
| Scalia | 0.063 | 0.000 |
| <i>n</i> | 16 | 12 |
| Souter | 0.500 | 0.630 |
| <i>n</i> | 12 | 9 |
| Stevens | 0.733 | 0.852 |
| <i>n</i> | 30 | 27 |
| Thomas | 0.083 | 0.000 |
| <i>n</i> | 12 | 8 |

2. Weighting for Tenure

The study uses micro-data though, for which each observation is a particular judge's vote on a specific issue in a case,³⁹⁸ but justices vary greatly in the number of votes they cast, ranging from Brennan's 3,498 to Goldberg's 292.³⁹⁹ If each vote were allowed to contribute equally, Brennan's performance would count for almost 12 times as much as Goldberg's performance. More generally, a judge with more votes would contribute more to the results than a judge with fewer votes. Because each judge should influence the results equally, the study weights by the inverse of the number of votes each judge casts.

³⁹⁷ *n* indicates the number of cases on which each justice ruled. The *n* is fewer for weighted cases than unweighted cases because unweighted cases implicitly drop all unanimous cases. Thus, the difference in the number of cases reported in the unweighted column from the weighted column reveal the number of unanimous cases on which that justice ruled.

³⁹⁸ See *infra* section entitled "Data"

³⁹⁹ These are the number of non-unanimous votes, as the weighting scheme discussed above implicitly drops all unanimous cases.

C. Level of Analysis and Data

Most early studies of judicial decisionmaking used aggregate data in which analysis is conducted at the judge level. That is, the aggregated votes of each judge are a single data point. This study follows the recent trend of conducting analysis at the level of judicial participations.⁴⁰⁰ Each judicial participation is a single judge's vote on a single issue of a single case and constitutes a separate observation.⁴⁰¹ For example, a case that presents two issues on which nine justices rule generates 18 observations. The dependent variable for each observation is coded 1 or 0, signifying whether a particular judge voted in the liberal or conservative direction on a particular issue in a particular case.⁴⁰²

D. The Model

Previous section of this Chapter detailed the independent variables that theory suggests should be included in a predictive model of judicial behavior. They include: a judge's pre-judicial ideology (*genview*), salience, *genview* interacted with salience, and *genview* interacted with each demographic variable. The initial⁴⁰³ model is as follows:

⁴⁰⁰ See Sisk & Heise, *supra* note 372, at 761-62 & n.117.

⁴⁰¹ *Id.*

⁴⁰² The study uses the U.S. Supreme Court Judicial Database maintained by Harold J. Spaeth. The database codes a justice's vote as either liberal or conservative. Liberal votes signify those in favor of the defendant in criminal procedure cases; women or minorities in civil rights cases; the individual against the government in First Amendment, due process, and privacy cases; the attorney in attorneys' fees and bar membership cases; the government against the owner in takings cases; the union against both individuals and the government in union cases; the government against challenges to federal regulatory authority, those claiming illegal restraint of competition, plaintiffs seeking compensation for injury, and those declaring bankruptcy in economic cases; the federal government in federalism and federal taxation cases; and the judiciary in judicial power cases. *The Official United States Supreme Court Judicial Database 1953-2003 Terms: Documentation*, at Codebook http://www.as.uky.edu/polisci/ulmerproject/allcourt_codebook.pdf. Conservative votes signify those in the opposite direction. *Id.* The database codes liberal votes as 1 and conservative votes as 0. *Id.*

The database is publicly available, regularly updated, and housed on the following website: <http://www.as.uky.edu/polisci/ulmerproject/sctdata.htm>. The version this study uses was updated on January 4, 2006. This includes some early decision of the Roberts court, which this study uses, but the study does not use the decisions of Chief Justice Roberts.

⁴⁰³ See generally *infra* Chapter Six for the final model and details on how it evolved.

$$\text{logit}(y_i) = \beta_1 + \beta_2 \text{ genview} + \beta_3 \text{ sal} + \beta_4 \text{ gv_sal} + \beta_5 \text{ gv_pol} + \\ \beta_6 \text{ gv_pact} + \beta_7 \text{ gv_pap} + \beta_8 \text{ gv_fdj} + \beta_9 \text{ gv_stj} + \\ \beta_{10} \text{ gv_rpp} + \beta_{11} \text{ gv_wsp} + \beta_{12} \text{ gv_prf}$$

where, y = a single justice's vote on a single issue of a single case

genview = general ideology,

sal = whether the case is salient

gv_sal = an interaction term of general ideology * salience

gv_pol = an interaction term of general ideology * politician

gv_pact = an interaction term of general ideology * politically active

gv_pap = an interaction term of general ideology * political appointee

gv_fdj = an interaction term of general ideology * federal judge

gv_stj = an interaction term of general ideology * state judge

gv_rpp = an interaction term of general ideology * recent private practice

gv_wsp = an interaction term of general ideology * writings and speeches

gv_prf = an interaction term of general ideology * professor (3)

Three aspects of the model are noteworthy. First, all of the demographic terms used in the model are included as interaction terms only. Typically, when using a dummy interacted with a continuous variable, both the dummy and the interaction term are included in the model. In this model, the coefficient for an individual dummy term would indicate the extent to which being a member of the group the dummy represents correlates with more liberal or conservative judicial behavior. There is no theoretical reason that being a member of any of the included groups, say being politician or politically active, correlates with a justice being more liberal or conservative *independent of ideology*. Thus, there is no reason to include the dummies. There is reason to believe that being a member of one of the included groups, say being a politician or politically active, makes it more likely that a justice votes in accord with his ideology. This is the affect that the coefficients on the interactions terms measure.

Second, the model above does not include a variable of specific-issue ideology (*spview*). As will be explained in further detail in Chapter Six, when *spview* is included in the model, all observations involving issues for which a judge does not have a measure of specific-issue ideology are dropped. Thus, separate models must be run, one that excludes *spview* and the other that includes it.

Third, the model uses a logit. The dependent variable is binary, which necessitates using a functional form that better accounts for this than ordinary least squares regression does. Either a probit or logit could be used, and most of the literature employs logit models.⁴⁰⁴

⁴⁰⁴ Sisk et al., *supra* note 309, at 1431 n.230 (citing Vicki Schultz & Stephen Petterson, *Race, Gender, Work, and Choice: An Empirical Study of the Lack of Interest Defense in Title VII Cases Challenging Job Segregation*, 59 U. CHI. L. REV. 1073, 1121 (1992); Theodore Eisenberg & Sheri Lynn Johnson, *The Effects of Intent: Do We Know How Legal Standards Work?*, 76 CORNELL L. REV. 1151, 1190 (1991))

CHAPTER SIX: STAGE ONE MODEL REFINEMENT AND RESULTS

I. Introduction

This section refines and presents the results of the model to predict judicial behavior using both aggregate and micro-level data. First, the reasons for using both types of data are discussed. Then, simple correlations and regressions are presented to establish the extent to which a judge's ideology is a good predictor of judicial behavior. Next, the other independent variables are incorporated into the analysis to complete the model. Lastly, the final model's results are presented that suggest the extent to which judges rule in accord with their ideology.

II. Use of Micro-Level and Aggregate Data

The final results of this first stage are based on analysis using micro-level data in which each observation is a judicial participation. This is in keeping with recent empirical studies of judicial decisionmaking and the recognition that using aggregate data is disfavored because it removes important variation that a model is meant to explain. However, the study also presents intermediate results using aggregate data⁴⁰⁵ for three reasons.

First, early studies on the attitudinal model using different measures of judges' ideology were performed on, and included graphs and summary statistics using, aggregate data. This study's use of aggregate data allows easy comparisons with past work, specifically how the predictive ability the general ideology variable this study developed compares with other variables past studies employed.

Second, although the study uses data at the level of each justice's vote on each issue of each case, the study is mostly concerned with justice-level characteristics, specifically, which characteristics are useful in predicting whether a judge rules in accord with is pre-judicial ideology. Indeed, the only case-level variables—*salience* and *spview*

⁴⁰⁵ To generate aggregate data from the micro-level data, justices' votes are collapsed on the particular independent variables being used. Essentially, collapsing justice votes returns the average vote (percentage of liberal votes) for each justice by whichever independent variables are being examined.

(a judge's prejudicial ideology on a specific issue the case presents)—have little variation within justices,⁴⁰⁶ and such data can be easily aggregated.⁴⁰⁷

The third reason the study presents results on aggregated data is that such data allows graphs that are easy to interpret. The raw data set includes over 60,000 observations. For such a mass of data it is difficult to discern patterns graphically, particularly when the dependent variable is binary. Collapsing the data presents the viewer with graphs that can be more easily understood.

There are problems, however, with using aggregated data when there is any, even minimal, intra-group variation. Consider the hypothetical justice who has a known ideology on criminal matters and civil rights. When the data is collapsed, it results in three data points, one for cases involving criminal matters, one for cases involving civil rights, and one for cases involving neither. It may be that only 5 percent of the justice's votes concern issues of criminal matters and another 10 percent concern civil rights issues. Eighty-five percent concern neither. Yet, when performing a regression on the aggregated data, each of these three data points is of equal worth. Although this partially can be accounted for by proper weighting, using the micro-data would likely produce more accurate results. This should give the reader pause in according too much value to the results based on aggregated data. Instead, they should be viewed solely for the purposes discussed herein.

⁴⁰⁶ *Salience* is binary, which limits variation to two values, and the variation of *spview* is limited within justices because most justices have only two or fewer issues on which they had a known ideology. This means that for those judges, the *spview* variable can take on, at most, only two values.

⁴⁰⁷ Data with little variation within groups allows for it to be easily aggregated to account for this minimal variation. Specifically, aggregating the data while accounting for *salience* creates two data points for each justice: one that represents the justice's average liberal vote on salient cases and the other that represents the justice's average liberal vote on non-salient cases. The minimal intra-justice variation in *spview* can be captured similarly when aggregating the data. For example, suppose a justice had a known ideology on two specific issues: criminal matters and civil rights. Aggregating the data while accounting for the justice's views on those specific issues, creates three data points: one for the justice's percentage of liberal votes on issues that didn't involve criminal matters or civil rights, the second for the justice's percentage of liberal votes on criminal matters, and the third for the justice's percentage of liberal votes on civil rights. Because there is so little variation in the independent variables for any particular justice, all the variation can be captured with just a few data points for each justice. In addition, because there is little intra-justice variation, collapsing the data at the justice level while accounting for the little variation that does exist, does not fundamentally change the reported relationships among the variables.

III. Simple Correlations and Regressions Based only on Ideology

This section presents results of simple correlations and regressions meant to show the relationships between judicial behavior (the rulings judges issue) and (1) the key independent variable (*genview*) and (2) specific-issue ideology (*spview*). The results suggest that general ideology is an excellent predictor of judicial behavior and specific-issue ideology is a good predictor of ideology. In addition, these interim results lead to the hypothesis (which is also tested) that the general ideology variable is not a good predictor for judicial behavior for judges about whom little is known.

A. Simple Correlations

Table 6.1 presents the general ideology score and unweighted and weighted percentage liberal votes for each justice. Simple correlation statistics reveal the extent to which *genview* appears to be a good predictor of judicial behavior. *genview* and the unweighted votes have a correlation of 0.93, and *genview* and the weighted votes have a correlation of 0.85.

Table 6.1:
The Justice's General Ideologies and Percent Liberal Votes

| Justices | General Ideology* (<i>genview</i>) | % Liberal Votes (unweighted) | % Liberal Votes (weighted) |
|-----------|--|------------------------------------|----------------------------------|
| Black | 0.895 | 0.720 | 0.691 |
| Blackmun | -0.152 | 0.515 | 0.545 |
| Brennan | 0.850 | 0.709 | 0.830 |
| Breyer | 0.467 | 0.551 | 0.721 |
| Burger | -0.725 | 0.341 | 0.170 |
| B.White | 0.250 | 0.486 | 0.393 |
| Clark | -0.200 | 0.559 | 0.344 |
| Douglas | 1.000 | 0.813 | 0.850 |
| Fortas | 1.000 | 0.708 | 0.707 |
| Ginsburg | 0.620 | 0.581 | 0.795 |
| Goldberg | 1.000 | 0.759 | 0.657 |
| Harlan** | -0.198 | 0.432 | 0.171 |
| Kennedy | -0.522 | 0.404 | 0.319 |
| Marshall | 1.000 | 0.717 | 0.880 |
| O'Connor | -0.447 | 0.386 | 0.293 |
| Powell | -0.455 | 0.395 | 0.295 |
| Rehnquist | -1.000 | 0.296 | 0.125 |
| Scalia | -1.000 | 0.336 | 0.192 |
| Souter** | -0.538 | 0.558 | 0.722 |
| Stevens | 0.000 | 0.602 | 0.723 |
| Stewart | 0.000 | 0.503 | 0.369 |
| Thomas | -0.958 | 0.300 | 0.155 |
| Warren | 0.722 | 0.742 | 0.778 |

* Derived by author. The range is -1.00 (unanimously perceived as conservative to 1.00 (unanimously perceived as liberal).

** No reliable information was found on the judge's ideology so the appointing President's common space scores were used.

B. Simple Regressions

Three regressions were run on the collapsed data using *genview* and *spview* (specific-issue ideology) as independent variables. The first model uses only *genview*, the second model uses only *spview*, and the third model uses *genview* and *spview*. The same models were run on the weighted and the unweighted data. Results are presented in Table 6.2.

Table 6.2:
Simple Regression Results on Collapsed Data

| | Unweighted | | | Weighted | | |
|--------------|--------------------|--------------------|--------------------|--------------------|-------------------|--------------------|
| | (1) Votes | (2) Votes | (3) Votes | (1) Votes | (2) Votes | (3) Votes |
| genview | 0.211 (11.89)** | | 0.155 (3.26)** | 0.314 (7.27)** | | 0.221 (3.86)** |
| spview | | 0.242 (8.81)** | 0.139 (3.53)** | | 0.349 (9.91)** | 0.202 (4.24)** |
| Constant | 0.525 (42.37)** | 0.521 (21.99)** | 0.541 (25.85)** | 0.488 (16.15)** | 0.47 (15.47)** | 0.499 (19.71)** |
| Observations | 23 | 26 | 26 | 23 | 26 | 26 |
| R-squared | 0.87 | 0.76 | 0.84 | 0.72 | 0.8 | 0.88 |

Absolute value of t statistics in parentheses

* significant at 5%; ** significant at 1%

Comparing the regressions on the unweighted data to the weighted data shows that for models 1 and 2, there was less correlation between justices' ideologies and their votes in the weighted data than the unweighted data— R^2 of 0.87 and 0.76 versus 0.72 and 0.8—yet ideology was a stronger predictor of votes in the weighted data than in the unweighted data. In model 3, ideology was both more strongly correlated with, and a stronger predictor of, justices' votes in the weighted data than the unweighted data.

One should not draw too many conclusions from the comparative results on the weighted and unweighted aggregate data. The benefit of the weighting is to control for inter-case variability. When the data is collapsed, the inter-case variation is eliminated, and there is less need to employ the weights. The benefit of the weights is clearer from the regression results on the micro-data presented later in this Chapter.

For now though, results on aggregate data are used to present initial results about the value of *genview* and *spview* as predictors and to allow for graphs that are more easily interpreted and easily compared with prior research on aggregate data. The following three figures illustrate the extent to which *genview* and *spview* are good predictors of votes. Figure 6.1 shows each justice's percentage of liberal votes as a function of the justice's general ideology with the regression line from model 1 overlaid. Figures 6.2 and 6.3 show each justice's percentage of liberal votes as a function of the justice's predicted percentage of liberal votes calculated from models 1 and 3 respectively. In these latter figures, the 45-degree line is overlaid to better see the difference between the

actual votes and the predicted votes. For each figure, the left panel uses unweighted data and the right panel uses weighted data.

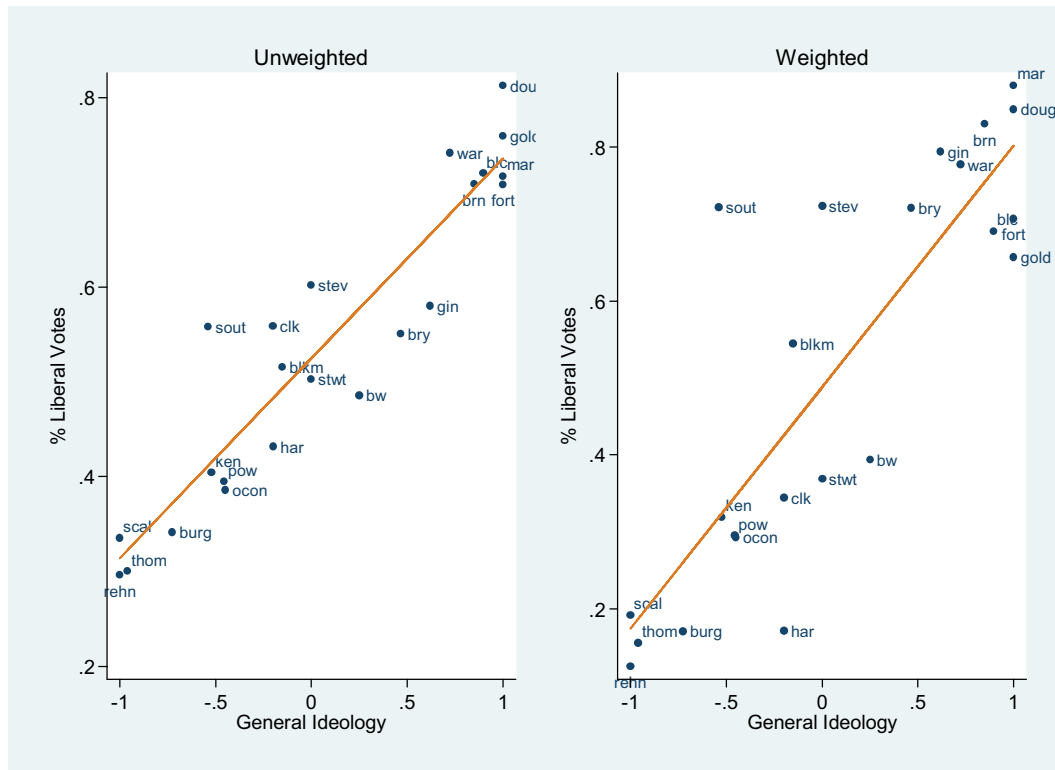


Figure 6.1:
Percent Liberal Votes versus General Ideology from Model 1

Two things are clear from Figures 6.1 and 6.2. First, regardless of whether the weights are used, *genview* appears to be a good predictor of a justice's performance on the bench. Second, although the unweighted data are more tightly grouped around the regression line, the weighted data probably yield more accurate results. For example, compare Justice Souter in the unweighted and weighted panels. Both reveal Souter to have been more liberal on the bench than he was expected to be, but the mismatch between prediction and outcome is larger in the weighted data. This reflects reality, as Souter is the example often discussed of a justice who performed vastly differently on the bench than he was expected to. A similar story could be told about Justice Stevens, albeit his mismatch between perceived ideology and performance is less extreme, primarily because he was perceived to be a moderate when President Ford nominated him. Conversely, Justice White (indicated by bw) performed far more conservatively on the

bench than it was believed he would when President Kennedy nominated him. Again, the weighted results reflect this reality better than the unweighted results.

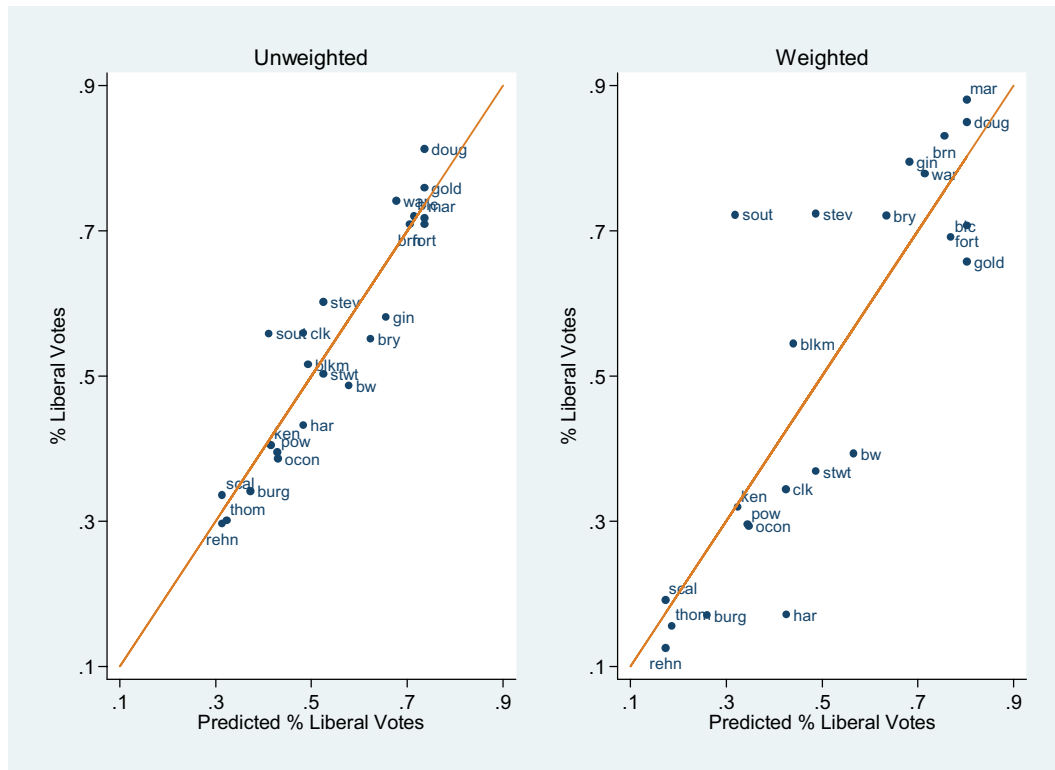


Figure 6.2:
Percent Liberal Votes versus Predicted Ideology from Model 1

1. Special Considerations When Incorporating Specific-Issue Ideology

Models 2 and 3 use the variable for specific-issue ideology (*spview*), which imposes significant limitations. Models 2 and 3 can be run *only* on observations involving issues on which the justice had a known ideology. These models do not use observations involving issues on which the justice had no known ideology because *spview* is missing for those observations and regressions cannot be run on observations for which information is missing for variables in the regression. An alternative regression, which is how this problem is resolved in many situations, would include a dummy variable that is coded 1 if the observation (in this case, the justice) has information on that variable and 0 otherwise. That dummy would then be interacted

with the *spview* variable. This has the effect of coding *spview* as 0 for every justice who has no *spview*.

This method cannot be used for this study because, here, a value of 0 has meaning. It does not indicate the *absence* of a known ideology on the issue. It indicates that the justice is *known to be a moderate* on the issue. Thus, employing a dummy here would treat every justice who has no known ideology on the specific issue being litigated as if the justice was known to be a moderate on the issue. This imposed assumption is almost certainly invalid. Thus, incorporating the specific-issue ideology requires running the model on a subset of the data, specifically, only those observations involving issues about which a justice has a perceived ideology. As the results from the regressions on the micro-data presented in Table 6.4 make clear, this excludes over five-sixths of the observations, limiting the regressions to being run on only 5,999 observations (8,157 observations when unanimous cases are included).

In Figure 6.3, which depicts the results from model 3, the data is more tightly grouped around the 45-degree line, indicating a closer match between actual and predicted votes. This is likely due in large part to the fact that model 3 uses *only* those observations for which a justice was ruling on an issue about which he had some specific known ideology. It logically follows that justices' performance track their ideologies better on issues on which they have some known bent than it does generally. The regression results in Table 6.2 bear this out. In the unweighted and weighted regressions, the regressions using models 2 and 3 (those incorporating *spview* and run on the subset of the data involving issues on which justices have a known ideology) have a higher R^2 than do the regressions using model 1.

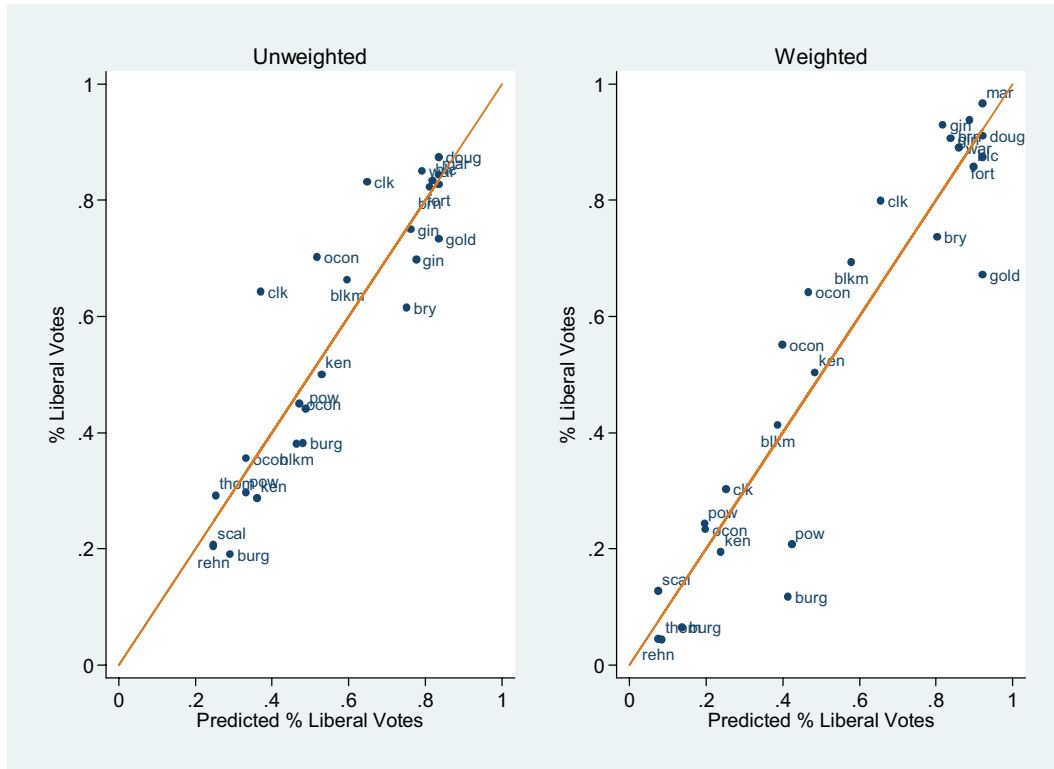


Figure 6.3:
Percent Liberal Votes versus Predicted Ideology from Model 3

Table 6.3 presents similar models as that in Table 6.2 but those in Table 6.3 are the estimated marginal effects from logit models run on the micro-data. Appendix C contains the coefficient estimates.⁴⁰⁸ These results are similar to those from the aggregate data discussed above.

⁴⁰⁸ This Chapter only displays the marginal effects estimates for logit results, but Appendix C shows the corresponding coefficient estimates for every model.

Table 6.3:
Marginal Effects Estimates of Simple Logit Regression Results on Micro-Data

| | Unweighted | | | Unweighted (Unanimous cases dropped) | | | Weighted | | |
|------------------|--------------------|--------------------|--------------------|---|--------------------|--------------------|--------------------|--------------------|--------------------|
| | (1) Votes | (2) Votes | (3) Votes | (1) Votes | (2) Votes | (3) Votes | (1) Votes | (2) Votes | (3) Votes |
| genview | 0.232 (71.93)** | | 0.235 (13.89)** | 0.345 (76.22)** | | 0.399 (17.30)** | 0.363 (81.64)** | | 0.488 (20.51)** |
| spview | | 0.321 (44.88)** | 0.145 (10.09)** | | 0.454 (44.89)** | 0.166 (8.74)** | | 0.507 (46.82)** | 0.165 (8.69)** |
| Constant | 0.025 (12.15)** | 0.029 (4.64)** | 0.045 (7.15)** | -0.017 (5.91)** | -0.025 (2.94)** | 0.008 -0.88 | -0.009 (3.15)** | -0.016 (1.75) | 0.035 (3.57)** |
| Observations | 61873 | 8527 | 8527 | 37851 | 5999 | 5999 | 37850 | 5999 | 5999 |
| Pseudo R-squared | 0.07 | 0.21 | 0.22 | 0.13 | 0.35 | 0.38 | 0.15 | 0.41 | 0.46 |

Absolute value of z statistics in parentheses

* significant at 5%; ** significant at 1%

There is an additional problem in using the variable for specific-issue ideology that prevents it from appearing in the final predictive model. It is clear how opinions on specific issues nest in domestic law. For example, if a Supreme Court nominee is described as conservative on criminal matters, it generally means he is less deferential to Fourth, Fifth, Sixth, and Eighth Amendment claims. The scant history of international humanitarian law litigation makes any similar classification in international law far less clear, which precludes using the specific-issue ideology for predicting ICC judicial behavior.

2. Empirical Evidence of the Benefits of Weighting for Issue Variability

The regression results also support the use of the weights to control for issue variability. Note the significant jump in pseudo R^2 that occurs when moving from the unweighted to the weighted data. Recall that weighting the data implicitly drops all unanimous cases. This results in regressions being run on data with less variation than are the regressions run on the unweighted data, which could account for the significant increase in model fit. It could be argued that much of the benefit from the weights is due to dropping the unanimous cases and, aside from that, the weights contribute little to controlling for inter-case variability. That is, the weights do not control for inter-case variability; they merely drop all unanimous cases, which results in a tighter model fit. To check this, regressions were also run on unweighted data but with all the unanimous cases dropped. The middle columns of Table 6.3 show the results of these regressions

and compares them to the results of the weighted and unweighted regressions for the simple logit model. Regressions run on the weighted data produced a better fit than regressions run on unweighted data with all unanimous cases dropped. In every model the study used, the weighted regressions produced a better fit than the unweighted regressions with unanimous cases dropped.⁴⁰⁹ This suggests the benefit of the weights exceeds that which comes from merely dropping the unanimous cases.

These simple regressions presented in this section tend to confirm the hypothesis that general ideology is an excellent predictor of judicial behavior. Of note is the results from model 3, which includes only cases involving issues about which justices had a known ideology. Even on this subset of cases, the general ideology score has more of an impact in predicting judicial behavior than the specific-issue ideology score does.

C. Effect of the Level of Knowledge About a Justice's Ideology

Model 3 uses only observations on which a justice had a known ideology about the specific issue being litigated, which causes it to discard all observations for Justices Souter, Harlan, Stevens, White, and Stewart.⁴¹⁰ Figures 6.1 and 6.2 reveal that Justices Souter, Stevens, Harlan, and White were among those whose performance departed most greatly from their predicted performance. Removing these from the sample, as model 3 indirectly does, naturally results in a better fit.

That those justices who show the greatest divergence between perceived ideology and performance on the bench had no known specific ideology leads to a testable hypothesis: those justices about whom more is known will perform more in accord with their perceived ideology than those about whom little is known.

In reviewing the newspaper articles reporting on the justices around the time of their nomination, it was clear that the level of knowledge about a nominee's views fell along a rather broad spectrum ranging from quite a bit for nominees such as Warren, Marshall, and Scalia to virtually nothing for nominees such as Harlan and Souter.

⁴⁰⁹ Subsequent tables showing regression results from different models only show the results from the unweighted and weighted regressions. The results from the unweighted regressions with unanimous cases dropped are available from the author upon request.

⁴¹⁰ See *supra* Table 5.2, which displays that these justices have no specific-issue ideology scores.

Testing this hypothesis requires a variable that captures how much is known about the ideology of a nominee. Although this study leaves that task for future research, this section examines the hypothesis by using whether the nominee had a known ideology about *any* specific issue as a proxy for whether that nominee's ideology generally was known. Thus, a binary variable called *litkn* was created that was coded 1 if the nominee had no known ideology about any specific issue and 0 otherwise. This variable was interacted with *genview* to examine the extent to which those justices about whom little is known act in accord with their perceived ideology and how that compares with the other justices. The results are presented in Table 6.4, which displays regression results on the collapsed data, and Table 6.5 which shows marginal effects estimates from logits run on the micro-data.

Table 6.4:
Regression Results Using *litkn* on Collapsed Data

| | Unweighted | | Weighted | |
|-------------------------|--------------------|--------------------|--------------------|-------------------|
| | (1) Votes | (2) Votes | (1) Votes | (2) Votes |
| genview | 0.211 (11.89)** | 0.22 (13.95)** | 0.314 (7.27)** | 0.335 (8.51)** |
| litkn | | -0.008 -0.3 | | -0.031 -0.45 |
| gen_litkn | | -0.259 (2.91)** | | -0.605 (2.73)* |
| Constant | 0.525 (42.37)** | 0.521 (42.52)** | 0.488 (16.15)** | 0.48 (15.73)** |
| Observations | 23 | 23 | 23 | 23 |
| R-squared | 0.87 | 0.91 | 0.72 | 0.8 |
| F test: | | | | |
| genview + gen_litkn = 0 | 0.2 | | 1.53 | |
| Prob > F | 0.661 | | 0.231 | |

Absolute value of t statistics in parentheses

* significant at 5%; ** significant at 1%

The regression results support the hypothesis that justices whose ideology is known act in accord with their perceived ideology whereas justices about whom little is known do not. The extent to which ideology is a predictor for those about whom little is known is *genview + gen_litkn*. For the aggregate data, in the unweighted regression, *genview* and *gen_litkn* almost perfectly cancel each other out. In the other regressions,

gen_litkn more strongly counteracts *genview*. In all the regressions though, an F test reveals that the study cannot reject the null hypothesis that $genview + gen_litkn = 0$ (that ideology is not a predictor of judicial behavior for those about whom little is known). The graphs in Figure 6.4 illustrate this, although the null effect of ideology, as represented by a flat line) is clearer for the unweighted regression than the weighted regression.

These results are expected. They show that those judges about whom little is known generally do not act in accord with the little knowledge about them. There are two possible reasons for this. One, because little is known about a justice's ideology, that limited knowledge is subject to more error. Two, it could be that little is known about a nominee's ideology because his ideology is not well settled and does not become well settled until the judge is on the bench.

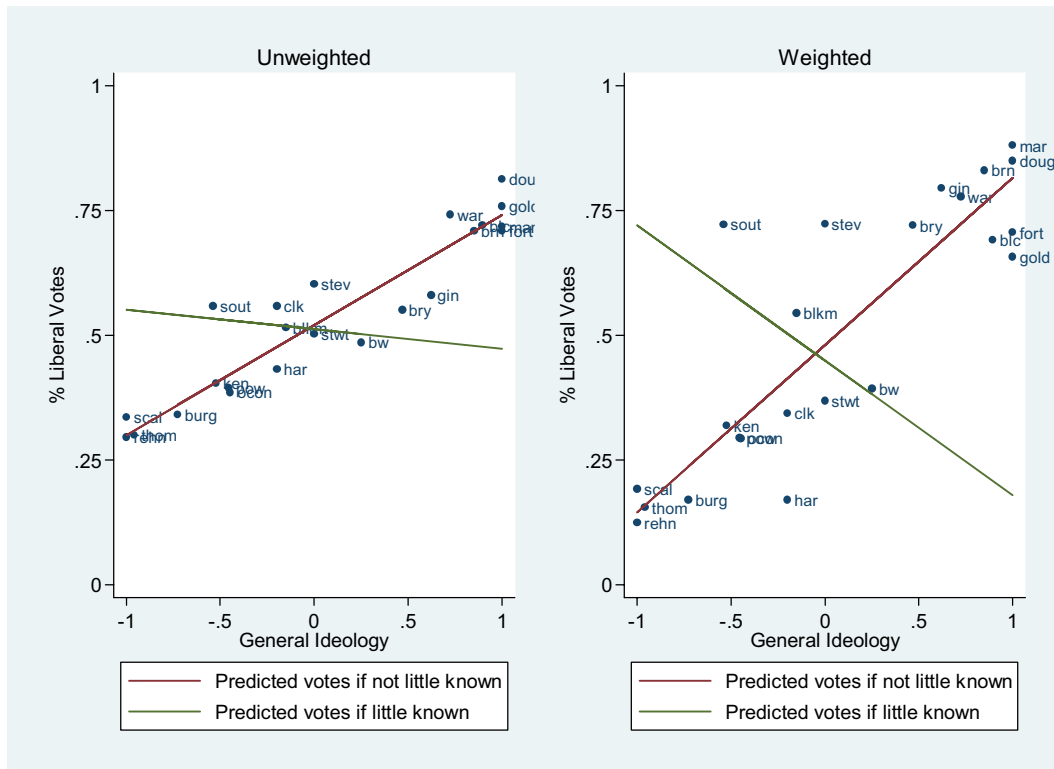


Figure 6.4:
Percent Liberal Votes versus General Ideology:
Accounting for Knowledge of Ideology

Regressions on the micro-data, presented in Table 6.5, produce similar results, although in the micro data, it is clearer that the justices about whose ideology little is known perform counter to their ideology on the bench. In each regression, the negative effect of *gen_litkn* exceeds the positive effect of *genview*. Unlike with the collapsed regressions, chi-squared tests here reject the hypothesis that $genview + gen_litkn = 0$ (that the coefficients perfectly counteract so that the effect of ideology on those about whom little is known is zero). To the contrary, the results on the micro-data suggest that those about whom little is known act opposite to their perceived ideology.

Table 6.5:
Marginal Effects Estimates of Logits Using *litkn* on Micro-Data

| | Unweighted | | Weighted | |
|----------------------------|--------------------|---------------------|--------------------|---------------------|
| | (1) Votes | (2) Votes | (1) Votes | (2) Votes |
| <i>genview</i> | 0.232 (71.93)** | 0.241 (73.02)** | 0.363 (81.64)** | 0.393 (83.30)** |
| <i>litkn</i> | | -0.014 (3.10)** | | -0.028 (4.16)** |
| <i>gen_litkn</i> | | -0.277 (15.84)** | | -0.624 (28.02)** |
| Constant | 0.025 (12.15)** | 0.029 (11.75)** | -0.009 (3.15)** | -0.019 (5.60)** |
| Observations | 61873 | 61873 | 37850 | 37850 |
| Pseudo R-squared | 0.07 | 0.07 | 0.15 | 0.17 |
| Chi-2 test: | | | | |
| $genview + gen_litkn = 0$ | | 4.41 | 112.56 | |
| Prob > Chi-2 | | 0.036 | 0 | |

Absolute value of z statistics in parentheses

* significant at 5%; ** significant at 1%

Caution should be exercised before drawing conclusions about the effect of the *litkn* variable. Recall that there are only five justices about whom little is known. That is too small a sample from which to draw firm conclusions, as one or a couple of justices who are not representative of the population could drive the results. Likely, the most that can be said is that one cannot predict how justices about whom little is known will perform when on the bench, which is precisely the conclusion logic would compel.

Note that the above regressions included the dummy *litkn* in addition to the interaction of *genview* and *litkn*. The previous Chapter theorized that, for the demographic variables, the dummy variables themselves (as opposed to the interactions

of the dummies with *genview*) should not be included in the model. It was postulated that there is no reason to believe that being a politician or politically active would cause one to be more conservative or liberal *independent of ideology*. With the little known variable, however, there is reason to believe that just the dummy is correlated with (though does not cause) a judge being more conservative. It may be that Republicans have sought to nominate justices about whom little is known because they believe (whether justified or not) that it would be easier to get those nominees confirmed compared with outwardly conservative nominees. If these nominees about whom little is known truly are conservative, because little is known about them, they would appear more moderate than they are. Such a practice would result in justices who are little known universally performing more conservatively than their general ideology score regardless of that score.

There is some empirical evidence for this hypothesis. Of the four justices who had no ideology score for any specific issue, four were nominated by Republicans. On the other hand, it seems that the earliest time at which Republicans could have perceived difficulty in getting conservative nominees confirmed, and thus deliberately sought to nominate people about whom little was known, was following the rejection of Nixon nominees Clement Haynesworth and Harrold Carswell in 1969 and 1970 respectively. After that, there were only two nominees who had no known ideology on any specific issue, Justices Stevens and Souter, both of whom performed more liberally than their ideology. Thus, just as with the demographic variables, it does not appear that there is a good theoretical reason to include just the dummy *litkn* in the model.

Overall, the results presented Table 6.5 suggest that judges about whom little is known not only do not act in accord with their ideology, which theory suggests, they act *counter* to the ideology. There is little theoretical rationale to support this latter finding. One reason in particular to discount the empirical results is the small sample of judges that make up the little-known group, and the caution that must be exercised in generalizing from small samples.

IV. Incorporating Other Variables into the Analysis—Building the Final Model

Thus far, the effect of only the ideology variables *genview* and *spview* have been analyzed, in addition to a variable, *litkn*, which was composed from the absence of *spview*. This analysis reveals that the ideology variables, *genview* specifically, were good predictors of ideology. With that established, the full predictive model can be built, which incorporate the additional variables—salience and the demographic variables—all of which are to be interacted with the general ideology variable.

A. Effect of Salience

Salience is the only case level characteristic that the study considers. Chapter Five discusses the theoretical basis for its inclusion, which, in brief, is that decision makers behave differently on matters that are salient. The hypothesis as applied to the present study is that Supreme Court justices decide important or controversial cases more in accord with their ideology than other cases. The analyses presented in this section suggest the validity of that hypothesis.

Table 6.6 and Figure 6.5 provide an initial empirical look at the difference between how justices ruled on salient versus non-salient cases. Table 6.6 shows the unweighted and weighted percentage liberal votes for each justice overall, on non-salient cases only, on salient cases only, and the difference between their votes on salient and non-salient cases. The justices are ordered according to the degree to which they vote more liberally on salient cases than non-salient cases. The table and graphs reveal that most justices strengthen their ideological stand on salient cases.

Table 6.6:
Comparison of Voting Based on Case Salience

| % Liberal Votes (unweighted) | | | % Liberal Votes (weighted) | | |
|------------------------------|---------------------------------|--------|----------------------------|---------------------------------|--------|
| Justices | Increase on salient cases | | | Increase on salient cases | |
| | Overall | | | Overall | |
| Goldberg | 0.759 | 0.163 | Goldberg | 0.657 | 0.277 |
| Marshall | 0.717 | 0.151 | Breyer | 0.721 | 0.138 |
| Brennan | 0.709 | 0.134 | Fortas | 0.707 | 0.107 |
| Breyer | 0.551 | 0.131 | Douglas | 0.850 | 0.076 |
| Ginsburg | 0.581 | 0.122 | Ginsburg | 0.795 | 0.057 |
| Fortas | 0.708 | 0.115 | Brennan | 0.830 | 0.053 |
| Douglas | 0.813 | 0.110 | Marshall | 0.880 | 0.042 |
| Souter | 0.558 | 0.097 | Blackmun | 0.545 | 0.030 |
| Stevens | 0.602 | 0.095 | Warren | 0.778 | 0.030 |
| Warren | 0.742 | 0.089 | Stevens | 0.723 | 0.016 |
| Blackmun | 0.515 | 0.075 | Thomas | 0.155 | 0.013 |
| Thomas | 0.300 | 0.030 | O'Connor | 0.293 | 0.008 |
| B.White | 0.486 | 0.030 | Powell | 0.295 | -0.003 |
| Black | 0.720 | 0.021 | B.White | 0.393 | -0.006 |
| Powell | 0.395 | 0.019 | Souter | 0.722 | -0.016 |
| Stewart | 0.503 | 0.016 | Stewart | 0.369 | -0.028 |
| O'Connor | 0.386 | 0.007 | Harlan | 0.171 | -0.028 |
| Harlan | 0.432 | -0.002 | Burger | 0.170 | -0.041 |
| Burger | 0.341 | -0.029 | Scalia | 0.192 | -0.051 |
| Clark | 0.559 | -0.039 | Rehnquist | 0.125 | -0.053 |
| Kennedy | 0.404 | -0.061 | Black | 0.691 | -0.066 |
| Rehnquist | 0.296 | -0.069 | Kennedy | 0.319 | -0.119 |
| Scalia | 0.336 | -0.071 | Clark | 0.344 | -0.127 |

Moreover, the degree to which a justice's votes differ between salient and non-salient cases correlates with the extent to which that justice votes liberally or conservatively generally. Those justices who vote most liberally tend to have the greatest increase in liberal voting on salient cases and those justices who vote most conservatively tend to have the greatest increase in conservative voting on salient cases. This can be seen graphically in Figure 6.5 through the difference between the blue data points and red data points, which represent each justice's percentage of liberal votes on non-salient and salient cases, respectively. Justices in the top half of the graphs, those who tend to issue liberal rulings, have red data points that sit atop the blue data points, whereas justices in the bottom half of the graphs, those who tend to issue conservative rulings, have red data points that sit below the blue data points.

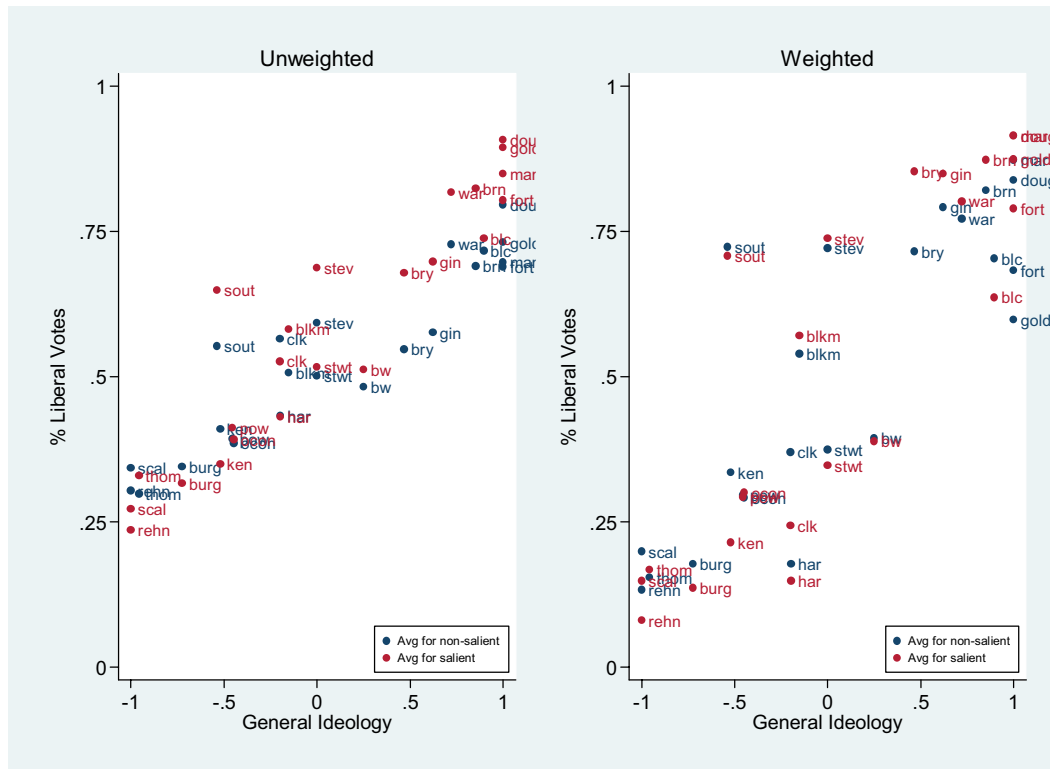


Figure 6.5:
Percent Liberal Votes on Non-salient and Salient Cases

The logit results presented in Table 6.7 support what the data in Table 6.6 and Figure 6.5 suggest: the salience of a case is an important factor in the extent to which a judge rules in accord with his ideology. Whether using unweighted data or weighted data, the interaction term of salience and general ideology is both practically and statistically significant. Figure 6.6 depicts the logit regression line derived from the micro-data overlaid on the aggregate data from Figure 6.5. The increased steepness of the red line in comparison to the green line indicates the strengthening effect of ideology on salient versus non-salient cases.

Table 6.7:
Marginal Effects Estimates of Logits Using Salience on Micro-Data

| | Unweighted | | Weighted | |
|-----------------|--------------------|--------------------|--------------------|--------------------|
| | (1) Votes | (2) Votes | (1) Votes | (2) Votes |
| genview | 0.232 (71.93)** | 0.22 (63.86)** | 0.363 (81.64)** | 0.349 (73.13)** |
| sal | | 0.043 (6.47)** | | -0.033 (3.93)** |
| gv_sal | | 0.123 (11.41)** | | 0.107 (8.01)** |
| Constant | 0.025 (12.15)** | 0.019 (8.76)** | -0.009 (3.15)** | -0.005 (1.65) |
| Observations | 61873 | 61873 | 37850 | 37850 |
| Pseudo R-square | 0.07 | 0.07 | 0.15 | 0.16 |

Absolute value of z statistics in parentheses

* significant at 5%; ** significant at 1%

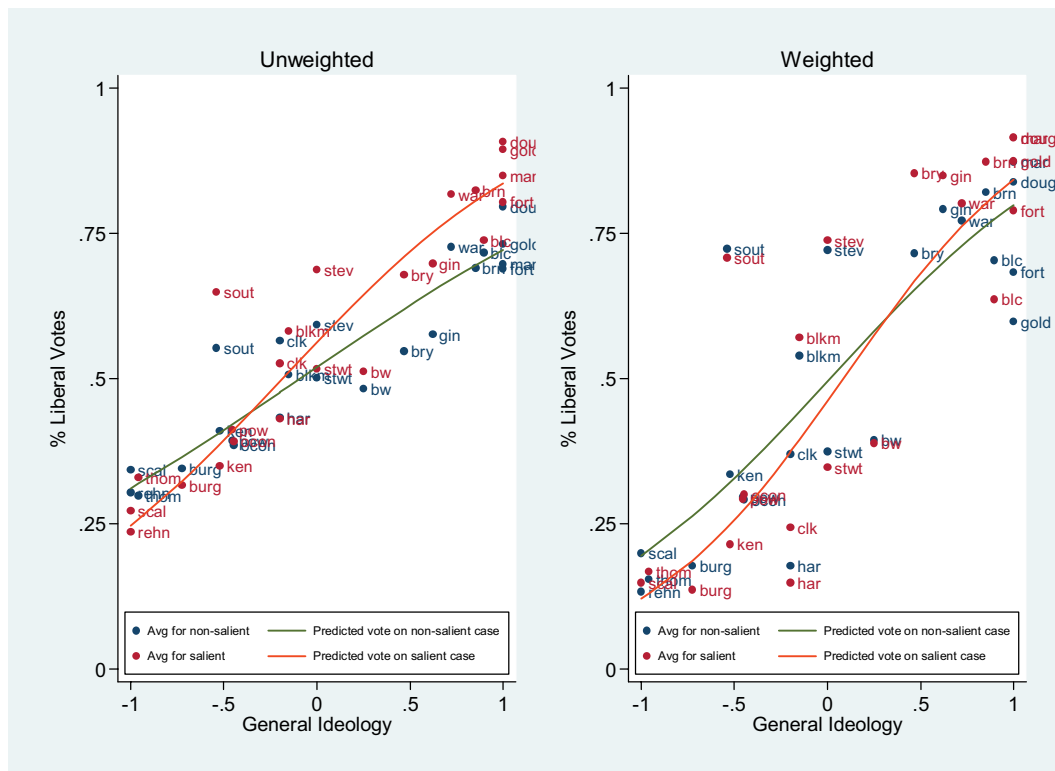


Figure 6.6:
Percent Liberal Votes versus General Ideology: Accounting for Salience

B. Effect of Demographic Characteristics

Incorporating the demographic variables in the regression presents problems of multi-collinearity and small sample size, particularly the results being too sensitive to one or a few non-representative observations. These problems are both due primarily to there being little intra-justice variation among the independent variables. This lack of variation means that, although the data contains over 60,000 observations, effectively, there are only 23 observations, one for each justice. Both problems—multi-collinearity and heightened sensitivity to non-representative samples—can be resolved, or at least reduced, by selecting demographic variables more discriminatingly and, where appropriate, combining variables.

1. Problems with Multi-Collinearity

The combination of little intra-justice variation and the relatedness of some of the independent variables creates a problem of multi-collinearity. Past research into judicial decisionmaking confronted similar problems, and some researchers adopted a conservative two-fold approach.⁴¹¹ One, they excluded one of two variables that exceed a correlation coefficient of 0.5.⁴¹² Two, they dropped one of two variables that are intended to serve as proxies for the same item or that are closely linked theoretically.⁴¹³ This study adopts a similar approach.

The variables for politically active and political appointee are highly correlated, having a correlation coefficient of 0.59. The coefficient, though, may obscure the high degree of their relatedness. Of the 13 justices who were politically active, only four were not political appointees. Of the ten who were political appointees, only one was not politically active. Instead of merely dropping one of the variables, as other researchers did, a new variable was constructed, *pactpap*, that was coded 1 if a justice had been either politically active or a political appointee and 0 otherwise. Because all but one of the

⁴¹¹ Sisk et al., *Charting the Influences on the Judicial Mind: An Empirical Study of Judicial Reasoning*, 73 N.Y.U. L. REV. 1377, 1431 n.230 (1998).

⁴¹² *Id.* (citing MICHAEL O. FINKELSTEIN & BRUCE LEVIN, STATISTICS FOR LAWYERS 352 (1990); GEORGE W. BOHRNSTEDT & DAVID KNOKE, STATISTICS FOR SOCIAL DATA ANALYSIS 407 (2d ed. 1988); MICHAEL S. LEWIS-BECK, APPLIED REGRESSION: AN INTRODUCTION 60 (1980)).

⁴¹³ *Id.*

justices who had been political appointees had also been politically active, this new variable is the same as the politically active variable with that one justice added.

The variable *litkn* discussed above was highly negatively correlated with the variable indicating whether justices had published writings or delivered speeches expounding on their views. None of the justices whose views were little known as indicated by the *litkn* variable had writings and speeches. This is understandable considering that had the justices publicly discussed their views in writings and speeches, it is unlikely they would have remained little known. Because these two variables appear to be the converse of one another, the *litkn* variable was excluded. In addition, as discussed earlier, the *litkn* variable suffered from the problem of a small sample.

2. Problem of Sample Size

Effectively having only 23 independent samples means that results are especially sensitive to one or a few observations that are not representative of the population. To guard against this, no demographic variables were included in the regression if only five or fewer judges had that characteristic. This excluded separate variables for politician, recent private practice, and professor. This, and the fact that the variables for federal judge and state judge were capturing similar concepts, influenced the study to combine those variables into one judge variable.

C. The Final Model and Results

The final model follows with results presented in Table 6.8 and Figure 6.7.⁴¹⁴

⁴¹⁴ For reasons discussed above, separate models were run with and without the specific-issue ideology variable. Additionally, a separate model was run excluding all observations for which the justice ruled on an issue about which the justice had a specific-issue ideology. Thus, three models were run: one including all cases, a second including only the observations for which no justice was ruling on an issue about which he had a specific-issue ideology, and a third including only the observations for which justices were ruling on issues about which they had a specific-issue ideology. The marginal effects estimates were similar for all the models. However, because the specific-issue ideology variable is of little use in predicting ICC decisionmaking, the results of regressions run on models including that variable are not presented. They are available from the author upon request.

$$\text{logit}(y_i) = \beta_1 + \beta_2 \text{ genview} + \beta_3 \text{ gv_pactpap} + \beta_4 \text{ gv_judge} + \beta_5 \text{ gv_wsp} + \beta_6 \text{ sal} + \beta_7 \text{ gv_sal} + \beta_8 \text{ spview}$$

where, y = a single justice's vote on a single issue of a single case

genview = general ideology

gv_pactpap = an interaction term of general ideology * (politically active or political appointee) (1)

gv_judge = an interaction term of general ideology * judge

sal = whether the case is salient

gv_sal = an interaction term of general ideology * salience

gv_wsp = an interaction term of general ideology * writings and speeches

spview = specific issue ideology

Table 6.8:
Marginal Effects Estimates of Logit Results of Final Model

| | Votes |
|---|--------------------|
| genview | 0.038 (2.56)* |
| gv_pactpap | 0.074 (5.84)** |
| gv_judge | 0.026 (2.32)* |
| gv_wsp | 0.301 (26.71)** |
| sal | -0.03 (3.47)** |
| gv_sal | 0.136 (9.80)** |
| Constant | -0.003 (0.94) |
| Observations | 37846 |
| Pseudo R-squared | |
| Absolute value of z statistics in parentheses | |
| * significant at 5%; ** significant at 1% | |

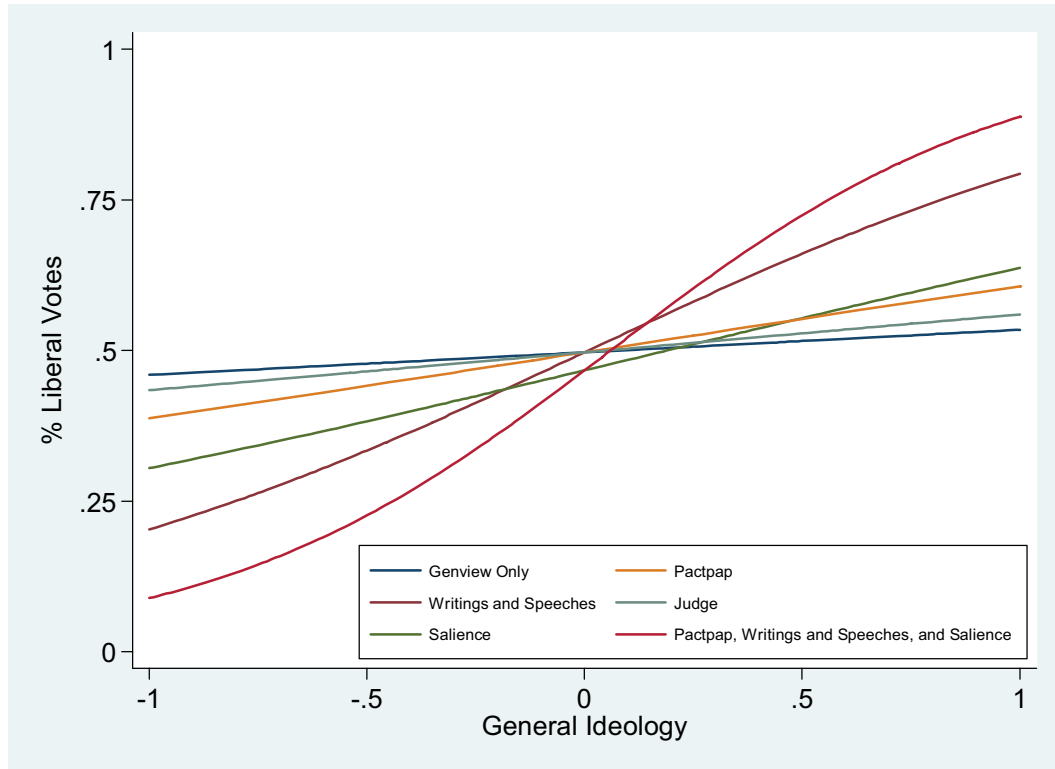


Figure 6.7:
Logit Regression Lines for Final Model

The results show that *genview* has little effect independent of the other variables with which it was interacted. The marginal effects estimate is only 0.038, which is indicated by the nearly flat, dark blue line in Figure 6.7. An estimate of 0.038 suggests that those with the most extremely liberal perceived ideology rule liberally only 3.8 percent more often than those perceived to be moderate, *ceteris paribus*.⁴¹⁵ Likewise, those with the most extremely conservative perceived ideology rule conservatively only 3.8 percent more often than those perceived to be moderate, *ceteris paribus*. This suggests that although justices tend to rule in accord with their ideology, this is highly correlated with other characteristics, and likely occurs only in conjunction with the presence of those other characteristics. One way to look at the effect of *genview* is as a residual. It constitutes the effect of ideology on decisionmaking for those justices who have none of the other characteristics, that is, those who were not politically active,

⁴¹⁵ *Ceteris paribus* translates to “all other things being equal.”

political appointees, or previous judges, had not published writings or delivered speeches, and were not ruling on cases that were important or controversial as indicated by the salient variable.

The largest single driver as to whether judges rule in accord with their ideology is whether they had published writings or given speeches. The marginal effects estimate is 0.301 and depicted by the crimson line in Figure 6.7. As discussed earlier,⁴¹⁶ there are likely two reasons for the strong effect of the writings and speeches variable. One, judges who had published writings and delivered speeches likely exposed their views while doing so. This greatly reduces the error in any estimation of the judge's ideology. Two, writing and speaking likely forced nominees to think about issues and develop a set of beliefs about them that then became well grounded. It is more likely that a judge who has well-developed and well-grounded beliefs will rule in accord with those beliefs about which the judge has previously espoused than would a judge whose beliefs are less developed and grounded.

The final empirical results, as did the interim results, also suggest that judges are more prone to rule in accord with their ideology on cases that are important or controversial as captured by the salience variable.⁴¹⁷ The salience variable interacted with the general ideology variable had a marginal effects estimate of 0.136 and is depicted by the green line in Figure 6.7. To a lesser but still significant extent, judges who had been politically active or political appointees tend to follow their ideology in their decisions. The rationale underlying this is similar to that for the effect of writings and speeches. Being politically active or a political appointee tends to develop, ground, and make known one's beliefs.

Lastly, having previously been a judge appears to have little effect on whether a Supreme Court Justice rules in accord with his ideology. That may be because lower court judges are constrained by precedent to a far greater extent than are Supreme Court

⁴¹⁶ See *supra* section entitled, "Demographic Variables" in Chapter Five.

⁴¹⁷ Intermediate regression results presented earlier that did not include the demographic interactions suggested this, and the effect remains with the inclusion of the demographic interactions were included.

justices. That is, lower court judges are bounded by the existing law. Attempting to estimate their ideology from past decisions made under this constraint is prone to error.

It must be remembered that the characteristics included in the final model are not mutually exclusive. The red line in Figure 6.7 is included to provide this reminder. It indicates the predicted percentage liberal votes across the full range of general ideology for a judge who had been politically active, a political appointee, or both, had previous writings or speeches, and was ruling on cases that were salient. Of course, other combinations of the independent variables are possible, but this combination includes the characteristics that, in combination, have the greatest predictive effect.

Table 6.9 depicts actual percentage liberal votes and percentage liberal votes predicted by the model. The correlation between the predicted votes and the unweighted votes is 0.92. The correlation between the predicted votes and the weighted votes is 0.89. Recall that the correlation between the general ideology score and the unweighted and weighted percentage liberal votes was 0.93 and 0.85 respectively. The model does not improve on correlation with the unweighted votes but does marginally improve on the correlation with the weighted votes. Although the improvement is only from 0.85 to 0.89, because the starting correlation was so high, there was little room to improve. Indeed, the model succeeded in reducing the extent to which the values were not correlated by 27 percent (4/15).

Table 6.9:
Actual and Predicted Percentage Liberal Votes

| Justices | % liberal votes (unweighted) | % liberal votes (weighted) | Predicted % liberal votes |
|-----------|------------------------------------|----------------------------------|------------------------------|
| Black | 0.720 | 0.691 | 0.821 |
| Blackmun | 0.515 | 0.545 | 0.481 |
| Brennan | 0.709 | 0.830 | 0.781 |
| Breyer | 0.551 | 0.721 | 0.662 |
| Burger | 0.341 | 0.170 | 0.208 |
| B.White | 0.486 | 0.393 | 0.525 |
| Clark | 0.559 | 0.344 | 0.466 |
| Douglas | 0.813 | 0.850 | 0.845 |
| Fortas | 0.708 | 0.707 | 0.622 |
| Ginsburg | 0.581 | 0.795 | 0.747 |
| Goldberg | 0.759 | 0.657 | 0.624 |
| Harlan | 0.432 | 0.171 | 0.475 |
| Kennedy | 0.404 | 0.319 | 0.309 |
| Marshall | 0.717 | 0.880 | 0.857 |
| O'Connor | 0.386 | 0.293 | 0.304 |
| Powell | 0.395 | 0.295 | 0.339 |
| Rehnquist | 0.296 | 0.125 | 0.152 |
| Scalia | 0.336 | 0.192 | 0.140 |
| Souter | 0.558 | 0.722 | 0.457 |
| Stevens | 0.602 | 0.723 | 0.494 |
| Stewart | 0.503 | 0.369 | 0.493 |
| Thomas | 0.300 | 0.155 | 0.151 |
| Warren | 0.742 | 0.778 | 0.772 |

D. Alternative Model and Error specifications

Alternative model and error specifications were attempted as a check on the specification of the final model. For example, although there was no theoretical reason to believe any of the demographic characteristics affects voting independent of ideology, the demographic dummy variables were included in the model. The coefficients for most were either statistically or practically insignificant, lending support to the validity of the theory that suggests their exclusion.

Using alternative error specifications was particularly important, as there is little reason to believe that the observations are independent and identically distributed. Specifically, the observations for each judge should be correlated within a judge. In addition, the error terms may be heteroscedastic in that error terms for different judges may be different.

First, the homoscedasticity assumption was relaxed. A GLS model was fit in which error terms were homoscedastic within judges but heteroscedastic across judges. The coefficients and standard errors changed little supporting the notion that the final

model was robust to such a possibility. Next, a random effects model was fit on a variation of the final model. The coefficients and standard errors changed slightly. Most test-statistics reduced although some increased. However, no coefficients lost their statistical significance with this or the other alternative error specifications. Thus, the results of the final model appear to be robust to these alternative specifications. It is important to note, though, that this study cannot utilize a random effects model for a similar reason it cannot use a fixed effects model that was discussed previously: the standard error of a prediction using a random effects model would be specific to each justice in the sample and thus could not be used for out of sample prediction.

E. The Contribution of the Stage One Results

The results from this technical stage allow the prediction of judicial behavior from judge (and one case) characteristics. They will be incorporated with the second technical stage—simulating ICC judicial nominations and elections to determine the makeup of the ICC’s judges—to assess how different policies and scenarios result in different ICC behavior.

CHAPTER SEVEN: STAGE TWO APPROACH AND METHODS— SIMULATING THE ICC’S JUDICIAL COMPOSITION

I. Introduction

The second technical stage entails simulating ICC judicial nominations and elections and conducting exploratory analysis to determine how various policies—particularly the United State’s efforts to influence the type of judges countries nominate and vote for—and scenarios affect the composition of the ICC bench. This Chapter briefly describes exploratory analysis and its appropriate applicability to developing and assessing policy regarding the ICC. The Chapter then details the simulation model the study employs including how it accounts for the relationship between uncertainties and policy levers to produce relevant measures.

II. Approaches to Analysis

A. Traditional Analysis

Traditional model-based analysis uses well-defined, verifiable models to determine outcomes for a set of known or most likely conditions in a given scenario.⁴¹⁸ Concerns about the reliability of parameter estimates are addressed through sensitivity analyses examining how the outcomes change as those estimates vary.⁴¹⁹ The process of the traditional approach can be summarized (albeit simplistically) in three steps: (1) select a scenario, (2) calculate a solution based on the most likely conditions (the best estimates of the parameters the model employs), and (3) conduct sensitivity analyses.⁴²⁰

This approach works well under certain conditions, key among them, the availability of a verifiable model and a narrow band of uncertainty. When the uncertainty involved in a problem grows large, however, the traditional approach becomes infeasible.

Uncertainty has myriad potential sources. It may be that the plausible scenarios are so numerous that no one (or even small set) can be selected to the exclusion of the others without fatally limiting the scope of the analysis. Choosing a single scenario or a

⁴¹⁸ Arthur Brooks et. al., *An Application of Exploratory Analysis: The Weapon Mix Problem*, 4 MIL. OP.. RES. 67 (1999).

⁴¹⁹ *Id.*

⁴²⁰ *Id.*

small set would produce reliable results for the scenario(s) examined leading to policy advice that only applies should reality mimic one of the tested scenarios. Should one of the plausible but unexamined scenarios come to be, the results and the policy advice would not be dependable. Relying on the results of such analysis would be tantamount to driving off a used-car lot having just purchased a convertible that runs perfectly with the exception that its top will not raise. The car is suitable and reliable, but only in clement weather, which is not certain to always occur. Likewise, the results of traditional analysis conducted under significant uncertainty are reliable, but only in particular scenarios that are not certain to occur.

A similar source of uncertainty occurs within scenarios. That is, even within a particular scenario, uncertainty may preclude designating any set of conditions as most likely. Numerous sets of conditions may be plausible, meaning that no single set of parameter values may be depended upon to produce reliable results across the range of plausible conditions. Moreover, the parameter values may be too uncertain to be represented by some probability distribution. When a policy problem involves these types of uncertainty, sometimes referred to as “deep uncertainty,”⁴²¹ an alternative to the traditional approach is needed.

B. Exploratory Analysis and Robust Decisionmaking

Exploratory analysis using a robust decisionmaking framework has become an increasingly relied upon approach to resolving policy problems involving deep uncertainty.⁴²² “Exploratory analysis can be generally defined as a search for robust solutions across plausible parameter values, scenarios conditions, decision options, measures of effectiveness, or representations (models).”⁴²³ Exploratory analysis and

⁴²¹ For a definition and discussion of the term “deep uncertainty,” see ROBERT J. LEMPET ET AL., SHAPING THE NEXT ONE HUNDRED YEARS: NEW METHODS FOR QUANTITATIVE, LONG-TERM POLICY ANALYSIS 3-4 & n.2 (2003), *available at* http://www.rand.org/pubs/monograph_reports/MR1626/index.html.

⁴²² *Id.* at 40, 43.

⁴²³ Brooks et al., *supra* note 418, at 67.

robust decisionmaking recognize that any particular scenario and set of parameter values are mere guesses, and entail examining the entire range of these plausible guesses.⁴²⁴

Exploratory analysis and robust decisionmaking cannot overcome all the challenges a situation containing deep uncertainty presents, particularly in the circumstances in which exploratory methods are most useful: informing policy problems for which there is insufficient information to build a veridical model.⁴²⁵ One particular challenge is that model validation may not be possible, especially when the analysis employs a heuristic model designed to aid analysts explore the underlying system as opposed to a model that intends to capture all of the system's dynamics.⁴²⁶

Another challenge is that exploratory analysis will not produce a single answer.⁴²⁷ However, that is not the purpose of exploratory analysis and robust decisionmaking, nor is it possible. Because there is no single scenario or set of parameter values that can be relied upon, there can be no single answer. Instead, the goal is to "[s]eek robust, rather than optimal, strategies."⁴²⁸ Robust strategies are those that perform "reasonably well compared to the alternatives across a wide range of plausible futures."⁴²⁹ Moreover, when the analysis employs a heuristic model, the purpose of the analysis is not to provide a single, certain answer, but to provide insight to support policymaking, including: (1) demonstrating that a plausible model has unexpected properties, which may illustrate the range of possible behaviors of the system; (2) suggesting hypotheses that explain troubling data; (3) developing an assortment of plausible worst-case scenarios that aid in creating hedging strategies; (4) finding special cases where small resource investment produce large dividends; (5) suggesting which inputs drive consequences in which ranges; and (6) searching for strategies robust to the inherent uncertainty (different

⁴²⁴ See generally Brooks et al., *supra* note 418; Steve Banks, *Exploratory Modeling for Policy Analysis*, 41 OP. RES. 435 (1993).

⁴²⁵ Steven C. Banks & James Gillogly, *Validation of Exploratory Modeling*, in THE PROCEEDINGS OF THE CONFERENCE ON HIGH PERFORMANCE COMPUTING 382, 383(1994), *available at* RAND/RP-298.

⁴²⁶ Banks & Gillogly, *supra* note 425, at 384; Banks, *supra* note 424, at 438.

⁴²⁷ Banks, *supra* note 424, at 440.

⁴²⁸ LEMPERT, ET AL., *supra* note 422, at 45.

⁴²⁹ *Id.* at 53.

plausible scenarios that have different plausible parameter values) the problem presents.⁴³⁰

C. Using Exploratory Analysis and Robust Decisionmaking to Gain Insight into the Plausible Behavior of the ICC

Exploratory analysis and robust decisionmaking methods are particularly well suited to examining the ICC. As one researcher put it, “Exploratory use involves guessing the details of systems for which there are no data.”⁴³¹ Put differently, robust decisionmaking entails finding useful conclusions that are invariant to uncertainty. The ICC is a system about which there is little useful data, which causes great uncertainty. The Court’s nascency results in a paucity of data—the behavior of a court whose judges were impaneled only three years ago and who have just begun overseeing cases will reveal little about its behavior dozens of years from now. In addition, the court’s uniqueness allows few analogies from which to draw—never before has there been a permanent international criminal tribunal, or an international court whose judges potentially wield as much power and enjoy as much independence as those on the ICC, or an international tribunal whose judges are seated in quite the manner as ICC judges are.

The methodology discussed below represents a first step in modeling the behavior of the ICC. The model is designed to provide insight to policymakers about how various U.S. policies and global events affect what types of judges will be elected to the court and what types of rulings the court will issue. It must be emphasized that this is only a first step at modeling the ICC. With time, the uncertainty surrounding the court will narrow, allowing future researchers to utilize the data that emerges.

III. Modeling ICC Behavior

The simulation described below models ICC judicial nominations and elections to provide insight into what types of judges will be elected to the court, what types of rulings the court will issue, and how these may be affected by U.S. policies (particularly the attempt to influence nominations and elections) across a range of uncertainties

⁴³⁰ Bankes, *supra* note 424, at 440.

⁴³¹ *Id.* at 435-36.

including country characteristics, country actions, responses to U.S. policies, and judicial behavior. This section describes the uncertainties, policy levers, the specifics of the model and how the uncertainties and policy levers relate, and the measures the simulation will produce.

A. The XLRM Framework: Exogenous Uncertainties, Policy Levers, Relationships, and Measures⁴³²

In policy problems involving deep uncertainty, it is often useful to create a table making clear the exogenous uncertainties (X), policy levers (L), relationships (R), and measures (M) that underlie the problem and provide the foundation of the model. The XLRM framework is displayed in Table 7.1. Its details will be discussed as the Chapter proceeds through the description of the simulation model.

⁴³² The XLRM Framework utilized in this study is drawn from LEMPERT, ET AL., *supra* note 421, at 70.

Table 7.1:
XLRM Table

| (X) Exogenous Uncertainties | (L) Policy Levers |
|--|---|
| Country characteristics | Attempt to influence other countries' nominations |
| Ideal point | Probability of nomination |
| Power U.S. has over it | Perceived ideology of nominee |
| Power a country like-minded to the U.S. has over it | Both |
| Power a country with opposing interests has over it | |
| Amiability with the U.S. | Attempt to influence other countries' votes |
| Importance | |
| Country actions | Join the ICC |
| Whether a country joins the ICC | Miscellaneous policies not specific to the ICC |
| Whether a country nominates a judge | Alter operations |
| Who a country nominates | Alter where operate and maintain forces |
| Who a country votes for | Refuse to participate in U.N. peacekeeping missions |
| The probability that a country cheats on its agreements | |
| Whether opposing countries attempt to influence— | |
| Nominations | |
| Votes | |
| Both | |
| Neither | |
| Whether like-minded countries attempt to influence— | |
| Nominations | |
| Votes | |
| Both | |
| Neither | |
| Whether countries have a regional preference in voting | |
| The probabilities that judges have certain characteristics relevant to judicial behavior or ICC judicial elections | |
| The extent of blowback from U.S. tactics | |
| A judge's judicial behavior | |
| (R) Relationships | (M) Measures |
| Equations contained in model | Predicted ideal point of each elected judge on salient cases |
| | Cumulative distribution function displaying the percentage of all possible three-judge panels that have five different probabilities (0.1, 0.25, 0.5, 0.75, 0.9) of issuing a liberal ruling on three types of salient cases (j-point = -0.75, 0.25, 0.5, 0.75) |
| | Cumulative distribution function displaying the percentage of all possible five-judge panels that have five different probabilities (0.1, 0.25, 0.5, 0.75, 0.9) of issuing a liberal ruling on three types of salient cases (j-point = -0.75, 0.25, 0.5, 0.75) |

B. Simulation Specifics

This section details the specifics of the model used to simulate the ICC nominations and elections process. Critical voting rules and constraints, the model's functional form and variables, various policies, and the levels of uncertainty and how that uncertainty is explored are discussed.

1. Number of Judges and Timing of Elections

The model's general rules reflect the Rome Statute's rules for nominations and elections. According to the Rome Statute, there are 18 judges on the court.⁴³³ All judges are elected to staggered nine-year terms with elections every three years.⁴³⁴ After every election (and currently) the bench has six judges whose terms expire in three years (the next election), six judges whose terms expire in six years (the second election thence), and six judges whose terms expire in nine years (the third election thence). When the terms of a group of six judges expire, six new judges are elected to the court. Thus, every three years, six judges have their terms expire and six new judges are elected.

2. Key Assumptions

The model uses three overarching key assumptions. One, a country nominates a judge whose perceived ideology (*genview*) equals the country's ideal point.⁴³⁵ Two, a country votes for judges whose perceived ideology comes closest to the country's ideal point. These assumptions reflect that a country will endeavor to place on the bench those judges that share (or reflect) the country's ideology. Three, countries only nominate their nationals. Although it is permissible to nominate a national of any Party State,⁴³⁶ it would be unusual for a state to nominate a non-national. In the first election, all but one

⁴³³ Rome Statute, *supra* note 3, art. 36(1). The number of judge could be increased if the presidency of the court proposes it and two-thirds of the Party States assent. *Id.* art.36(2).

⁴³⁴ *Id.* art. 36(9).

⁴³⁵ It may be more accurate to consider this to be a government's ideal point as opposed to a country's ideal point, as a country's ideal point at any point in time is a function of the country's government (or controlling regime). For example, if a new regime takes power in a country, the ideal point could change markedly. Nonetheless, as this variable exists at the country level, the study refers to it as a country's ideal point.

⁴³⁶ *Id.* art. 36(4)(b).

state nominated one of its nationals and in the second election, every state nominated one of its nationals.

3. Operationalizing U.S. Influence

The policies discussed in greater detail below center on U.S. attempts to influence other countries' nominations of judges, votes for judges, or both. Specifically, the United States attempts to influence countries to nominate or vote for (or both) judges whose perceived ideology (*genview*) is closer to the ideal point of the United States.

As illustrated in Figure 7.1, both the United States and another country have ideal points that can be plotted in ideological space. The United States attempts to influence the other country to move toward the position of the United States for purposes of selecting or voting for a nominee. The extent to which the other country moves is a function of the influence the United States exerts. As will be described below, the value of the influence function will be normalized so that positive values for influence must fall between 0 and 1, with 0 indicating no influence and 1 indicating maximum influence. If the United States has no influence (influence = 0) over the other country, the other country does not shift its position; it nominates and votes for judges that share its ideal point. If the United States exerts maximum influence (influence = 1) over the other country, the other country shifts to the U.S. position for purposes of nominating and voting for judges; it nominates or votes for (or both) a judge that shares the United States' ideal point. Thus, influence can be looked at as the percentage of the distance between the ideal points of the United States and the other country that the United States is able to reduce. For example, if influence equals 0.30, the other country moves 30 percent closer to the United States. If influence equals 0.65, the other country moves 65 percent closer to the United States.

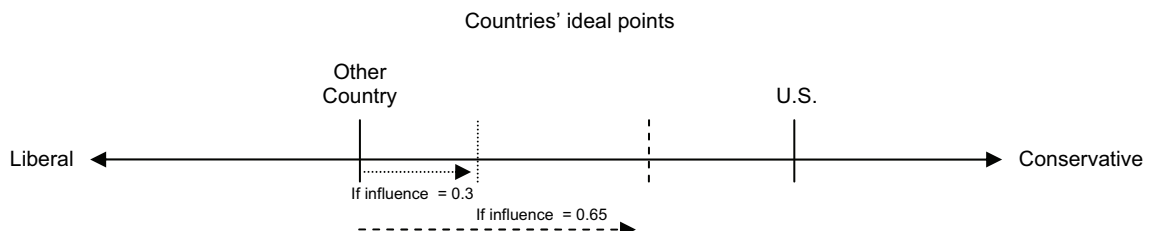


Figure 7.1:
Attempt of U.S. to Influence

The literature on international negotiation and bargaining was consulted to generate a function for influence. Much of the literature referred to the factors that affect a nation's "flexibility" in a bargaining situation.⁴³⁷ Flexibility describes the extent to which a nation can move from its initial (likely ideal) position toward another country's position.⁴³⁸ This study uses the term "influence" to describe a similar concept: the extent to which the United States can move a nation from its ideal point toward the U.S. ideal point.⁴³⁹

The factors previous studies have found to be important in determining the extent of a party's influence can be split into two categories: procedural factors and substantive factors.⁴⁴⁰ Procedural factor include such things as the structure of the negotiating team, the location of negotiations, and the formality of the meetings.⁴⁴¹ Although it is likely true that the process by which the United States attempts to exert influence would have some effect, the model does not control for such procedural aspects. Instead it focuses on the substantive factors affecting influence. The implicit assumption is that substantive factors are the largest determinants of influence and that procedural factors have only a marginal additional effect. An alternative assumption is that looking at only substantive

⁴³⁷ E.g., Daniel Druckman & Christopher Mitchell, *Flexibility in Negotiation and Mediation*, 542 ANNALS AM. ACAD. POL. & SOC. SCI 11 (1995); Daniel Druckman, *The Situational Levers of Negotiating Flexibility*, 37 J. CONFLICT RESOL. 236 (1993).

⁴³⁸ Druckman, *supra* note 437, at 237.

⁴³⁹ Some of the literature refers to "influence" similarly as to how this study uses it. For example, in a study of bilateral inter-nation influence, J. David Singer wrote, "An influence attempt is described primarily in terms of: (a) A's *prediction* as to how B will behave in a given situation in the absence of the influence attempt; (b) A's *preference* regarding B's behavior; and (c) the techniques and resources A utilizes to make (a) and (b) coincide as nearly as possible." J. David Singer, *Inter-Nation Influence: A Formal Model*, 57 AM. POL. SCI. REV. 420, 422 (1963) (emphasis in original).

⁴⁴⁰ Druckman and Mitchell referred to these as substance and style. Druckman & Mitchell, *supra* note 437, at 15.

⁴⁴¹ Druckman, *supra* note 437, at 239, 242-43 (citing O. Ben-Yoav & D.G. Pruitt, *Accountability to Constituents: A Two-Edged Sword*, 34 ORGANIZATIONAL BEHAVIOR & HUM. PREFERENCE 283 (1984); A.A. Benton & Daniel Druckman, *Constituent's Bargaining Orientation and Intergroup Negotiation*, 4 J. APPLIED PSYCH. 141 (1974); K. Zechmeister & Daniel Druckman, *Determinants of Resolving a Conflict of Interest: A Simulation of Political Decision Making*, 17 J. CONFLICT RESOL. 63 (1973); Daniel Druckman et. al., *Effects of Representational Role Obligations on the Process of Children's Distribution of Resources*, 35 SOCIOMETRY 387 (1972); D.W. Organ, *Some Variables Affecting Boundary Role Behavior*, 34 SOCIOMETRY 524 (1971); M.G. Herman & N. Kogan, *Negotiation in Leader and Delegate Groups*, 12 J. CONFLICT RESOLUTION 332 (1968) J. Galtung, *Summit Meetings and International Relations*, 1 J. PEACE RES. 36 (1964)).

factors produces a mean estimate for influence that could increase or decrease depending on the positive or negative effect of procedural factors.

The substantive factors that determine the extent of a country's influence over another country include the relative or comparative power of the countries,⁴⁴² the amiability of relations between them,⁴⁴³ and whether positions on the issue derive from an ideology (put differently, the importance of the issue to the country).⁴⁴⁴ The influence country A has on country B is positively correlated with A's comparative power and the countries' amiability with each other, and negatively correlated with how important the issue is to country B. This leads to the following functional form:

$$\text{influence} = \frac{\text{net comparative power} + \text{net amiability}}{\text{importance}} \quad (1)$$

net comparative power and *net amiability* were added because the theoretical independence of the constructs suggests that they should have an independent effect on U.S. influence. That is, the strength of U.S. power should not impact the effect of amiability and the extent of amiability should not impact the effect of U.S. power. For example, the effect of amiability on U.S. power would be the same regardless of whether the U.S. had great or little power over another country. This may be conceptually clearer in extreme cases. For example, if the variables were interacted, having a value of zero

⁴⁴² Druckman, *supra* note 437, at 256-59 (citing T.D. King, *Role Reversal and Problem Solving in International Negotiations: The Partial Nuclear Test Ban Case*, unpublished dissertation (1979); P. Terrence Hoppman, *Asymmetrical Bargaining in the Conference on Security and Cooperation in Europe*, 32 INT'L ORG. 141 (1978); P. Terrence Hoppman, *Bargaining in Arms Control Negotiations: The Seabeds Demuclearization Treaty*, 28 INT'L ORG. 313 (1974)).

⁴⁴³ P. TERRENCE HOPPMAN, *THE NEGOTIATION PROCESS AND THE RESOLUTION OF INTERNATIONAL CONFLICT* 195 (1996); Druckman, *supra* note 437, at 256-59 (citing Daniel Druckman & B.J. Broome, *Value Differences and Conflict Resolution: Familiarity or Liking*, 35 J. CONFLICT RESOL. 571 (1991); P. Terrence Hopmann & C. Walcott, *The Bargaining Process in Arms Control Negotiations: An Experimental Analysis*, University of Minnesota, Harold Scott Quigley Center of International Affairs (1973)).

⁴⁴⁴ STARKEY, ET AL., *NEGOTIATING A COMPLEX WORLD: AN INTRODUCTION TO INTERNATIONAL NEGOTIATION* 79 (1999); HOPPMAN, *supra* note 443, at 102; Druckman, *supra* note 437, at 256-59 (citing Daniel Druckman, et al., *Value Differences and Conflict Resolution: Facilitation or Delinking?*, 32 J. CONFLICT RESOL. 489 (1988); Daniel Druckman, et al., *Conflict of Interest and Value Dissensus: Two Perspectives*, in *NEGOTIATIONS: SOC. PSYCHOLOGICAL PERSP.* (ed. Daniel Druckman) (1977); K. Zechmeister & Daniel Druckman, *supra* note 441; Daniel Druckman & K. Zechmeister, *Conflict of Interest and Value Dissensus: Propositions in the Sociology of Conflict*, 26 HUM. REL. 449 (1973)).

for one variable (e.g., *net amiability* equals zero) would negate the effect of the other, no matter how large its value (*influence* would equal zero).

That the variables should be independent has a stronger theoretical foundation than that the terms should have an equal effect, which is also a result of the influence function. To some extent, the systematic variations in the variables, which the simulation explores and which is discussed later in this chapter, relaxes this assumption. Testing the effect of an increase in *net comparative power* while *net amiability* remains static is, within some range, tantamount to testing the increase in the effect of *net comparative power* as compared with *net amiability*. The same is true of testing the effect of an increase in *net amiability* while *net comparative power* remains static.

a) Net Comparative Power

net comparative power measures the power the United States and other like-minded countries wield on this issue over the country that the United States is attempting to influence as compared with the power a country with an opposing view on the issue wields over the country the United States is trying to influence.⁴⁴⁵ Thus, *net comparative power* is a function of the power the U.S. wields over the other country (*U.S. power*), the power like-minded countries wield over the other country (*like-minded power*), and the power countries with an opposing view wield over the other country (*opposing power*). Specifically:

$$\text{net comparative power} = \sqrt{(\text{U.S. power})^2 + (\text{like-minded power})^2} - \text{opposing power} \quad (2)$$

Squaring *U.S. power* and *like-minded power*, then adding them, then taking the square route ensures that there is a diminishing marginal effect of power from multiple sources.

Values for *U.S. power* were derived from the average amount of aid the United States gave to recipient countries as a percentage of their GDP from 2002–2004.⁴⁴⁶ This

⁴⁴⁵ Power is used in a sense similar to Morgenthau's classic definition: "When we speak of power, we mean man's control over the minds and actions of other men." HOPPMAN, *supra* note 443, at 102 (quoting HANS J. MORGENTHAU, *POLITICS AMONG NATIONS* 26 (4th ed. 1967)). Similarly, power means one country's control over the actions of another country.

⁴⁴⁶ Aid amounts are listed in U.S. Department of State, *Voting Practices in the United Nations* (2002–2004), at <http://www.state.gov/p/io/conrpt/vtgrprc/> (last visited March 8, 2006). Data for GDP for the

is an especially relevant measure given the extent to which the United States has been willing to use aid as a lever in convincing states to sign Article-98 agreements.⁴⁴⁷

Values for *like-minded power* and *opposing power* derived from a country's trade dependence on and military ties to the more powerful countries. Specifically, these values were based on a country's exports to the influencing countries as a percentage of the country's GDP and the country's purchase of military equipment from the influencing countries as a percentage of the country's military expenditures.⁴⁴⁸ This combination of military and economic dependence on a more powerful state serves as a useful, albeit imperfect, proxy for the power that state wields over another state.

Only countries on the U.N. Security Council (with the inclusion of Germany given its ideological alignment with France regarding the ICC and the extent of its power both regionally and globally) were considered as like-minded or opposing powers. The like-minded powers are China, Russia, and the United Kingdom. China and Russia have been skeptical of an international criminal court in principle and are not party to the ICC. The United Kingdom has embraced the ICC but, given its international military activity, it has great incentives for the court to be constrained. Opposing powers are France and Germany, which have championed the ICC and opposition to U.S. Article-98 agreements. Based on economic and military dependence, the power each country (China, Russia, United Kingdom, France and Germany) has over another country took a value of 0, 1, 2, or 3. The number of countries over which the powerful countries have different levels of power (>0, 0, 1, 2, and 3) are displayed in Figure 7.2. The power figures portray China and Russia as more regional than global powers. In comparison, France, Germany, and the United Kingdom have power over more countries both overall and within every level

relevant years is reported by World Bank, World Development Indicators (2005), *data available at* <http://devdata.worldbank.org/data-query/> (last visited March 8, 2006).

⁴⁴⁷ See *supra* section entitled "Congressional Action" in Chapter Two.

⁴⁴⁸ For the data source for GDP, see World Bank, *supra* note 446. Exports data was provided by the U.N. Commodity Trade Statistics Database, *available at* <http://unstats.un.org/unsd/comtrade/> (last visited March 8, 2006). Data on military transfers was provided by Stockholm International Peace Research Institute, The Arms Transfers Database, *available at* http://www.sipri.org/contents/armstrad/at_data.html (last visited March 8, 2006). Data on military expenditures was provided by Stockholm International Peace Research Institute, SIPRI Military Expenditures Database, *described at* http://www.sipri.org/contents/milap/milex/mex_database1.html (last visited March 8, 2006).

of power. Their figures are exceeded by those of the United States. That these values appear to reflect reality suggests that the study uses an adequate construct for power.

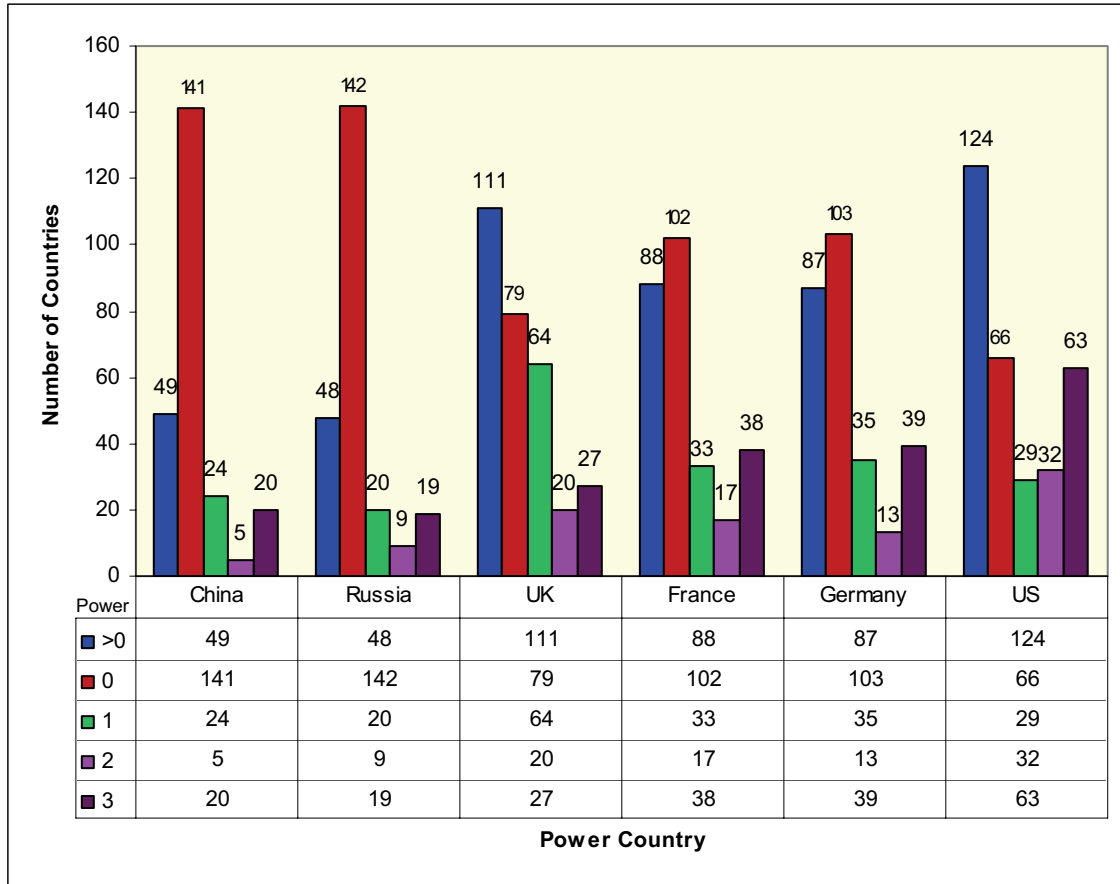


Figure 7.2:
Breadth and Extent of Power of the Powerful Countries

These individual power values are combined in different ways to constitute *opposing power*, *like-minded power*, and *net comparative power*. *opposing power* is derived from the following formula:

$$\text{opposing power} = \sqrt{(\text{France's power})^2 + (\text{Germany's power})^2} \quad (3)$$

As above, the function is constructed so each element has a diminishing marginal effect.

Unlike the function for *opposing power*, *like-minded power* does not combine the power values of the like-minded countries. Rather, *like-minded power* takes the maximum power value of China, Russia, and the United Kingdom. This difference in treatment allows *U.S. Power*, *like-minded power*, and *opposing power* to have

comparable relative effects on *net comparative power* and to cancel each other out, which would not occur if *like-minded power* and *opposing power* were each constructed in the same manner. This can be seen by looking at the more detailed version of *net comparative power*:

$$\begin{aligned} \text{net comparative power} = & \\ & \frac{\sqrt{(U.S. \text{ power})^2 + \max(\text{China's power}, \text{Russia's power}, \text{UK's power})^2}}{\sqrt{(\text{France's power})^2 + (\text{Germany's power})^2}} - \end{aligned} \quad (4)$$

Thus, the combination of *U.S. Power* and *like-minded power* is the square root of the sum of the square of two discrete values that range of zero to three. Likewise, *opposing power* is the square root of the sum of the square of two discrete values that range of zero to three.

b) Net Amiability

net amiability measures the state of relations with the country the United States is trying to influence (or more accurately, the extent to which good relations leads that country to adopt the U.S. position) minus the extent to which U.S. policies cause a worsening of those relations. Thus, *net amiability* is a function of *amiability* and *blowback*. Specifically:

$$\text{net amiability} = \text{amiability} - \text{blowback} \quad (5)$$

Values for a country's *amiability* were determined based on whether its recent votes in the U.N. General Assembly align or conflict with wishes of the United States. Specifically, the measure was created based on the combination of (1) votes in the U.N. General Assembly from 2001 through 2004 on matters that the United States designated as important and about which the U.S. Ambassador lobbied other countries to vote along with the United States and (2) the difference between those votes and all other substantive votes in the U.N. General Assembly, which indicates the increased or decreased willingness of a country to align with the United States on matters the United

States deems important.⁴⁴⁹ The measure is constructed by adding the index derived from measure (1) to one-half the index derived from measure (2).

For example, on votes important to the United States, China had an index score of -64.7. On all other substantive votes, China had an index score of -60.2. The difference (-4.5) indicates the decreased willingness of China to align with the United States on matters the United States deems important. China's amiability index score is:

$-60.2 + 0.5 * -4.5 = -66.9$. In contrast, the Czech Republic had an index score of 15.7 on votes important to the United States and an index score of -6.6 on all other votes. The difference (22.3) indicates the Czech Republic's increased willingness to align with the United States on matters the United States deems important. The Czech Republic's amiability index score is: $15.7 + 0.5 * 22.3 = 26.8$.

Countries were placed into discrete amiability categories by amiability index score. The amiability category scores ranged from -3 to 3. The number of countries in each amiability category are displayed in Figure 7.3.

⁴⁴⁹ This measure is a variation of a measure created as part of the RAND Arroyo Center's FY03 *Army Global Posture for the New National Security Environment* project. A full description of the methodology developing the measure is available from the author upon request. The source data for the measure was U.S. Department of State, Voting Practices in the United Nations (2001-2004). Note that the data excludes procedural votes, which typically are unanimous.

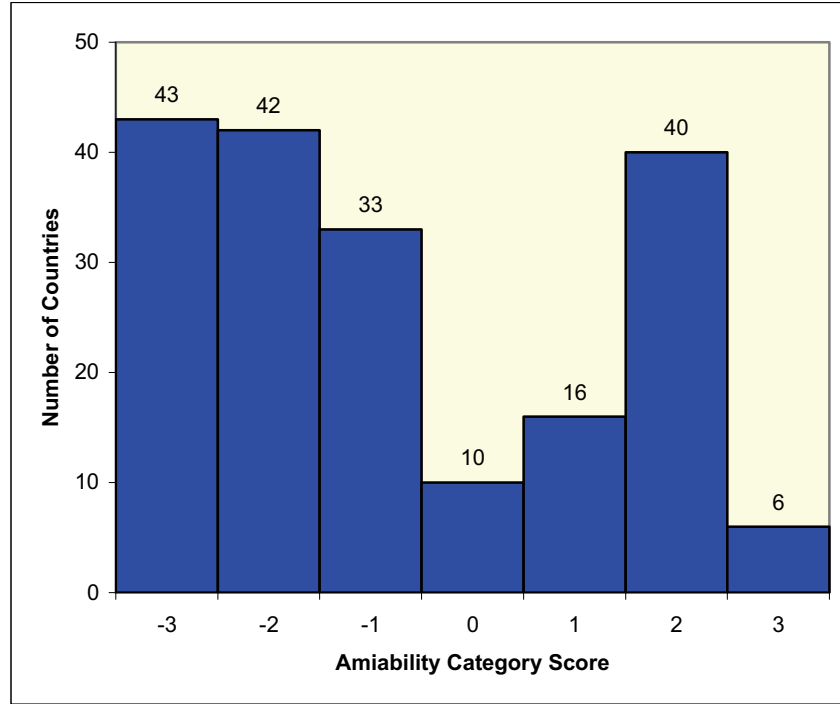


Figure 7.3:
Breadth and Extent of Power of the Powerful Countries

blowback is a function of *amiability* and a blowback factor (*b*). Specifically:

$$blowback = \frac{b(3 - |amiability|)}{4} \quad (6)$$

The blowback factor (*b*) can take on values of zero (no blowback), 1.5 (moderate blowback), and 3 (heavy blowback).

The function is constructed so that there will be little blowback with respect to those countries that are extremely amiable or extremely antipathetic to the United States. The assumption is that U.S. attempts to influence ICC nominations and elections will not worsen U.S. ability to influence those countries with which the United States is on the best of terms. Similarly, U.S. tactics cannot worsen U.S. ability to influence those countries for which that ability is already as low as possible. Conversely, the United States is likely to experience more blowback from countries with which the United States has more neutral relations. Panel (a) of Table 7.2 illustrates this by displaying the values for *blowback* for different levels of *amiability* and the blowback factor (*b*).

Table 7.2:
Blowback and Net Amiability

| <i>b</i> | <i>amiability</i> | | | | | | | (a) |
|----------|-------------------|------|------|------|------|------|------|-----------------|
| | -3 | -2 | -1 | 0 | 1 | 2 | 3 | |
| 0 | 0.00 | 0.00 | 0.00 | 0.00 | 0.00 | 0.00 | 0.00 | Calculating |
| 1.5 | 0.00 | 0.38 | 0.75 | 1.13 | 0.75 | 0.38 | 0.00 | <i>blowback</i> |
| 3 | 0.00 | 0.75 | 1.50 | 2.25 | 1.50 | 0.75 | 0.00 | |

| <i>b</i> | <i>amiability</i> | | | | | | | (b) |
|----------|-------------------|-------|-------|-------|-------|------|------|-----------------------|
| | -3 | -2 | -1 | 0 | 1 | 2 | 3 | |
| 0 | -3.00 | -2.00 | -1.00 | 0.00 | 1.00 | 2.00 | 3.00 | Calculating |
| 1.5 | -3.00 | -2.38 | -1.75 | -1.13 | 0.25 | 1.63 | 3.00 | <i>net amiability</i> |
| 3 | -3.00 | -2.75 | -2.50 | -2.25 | -0.50 | 1.25 | 3.00 | |

Combining equations 5 and 6 yields the following function:

$$net\ amiability = amiability - \frac{b(3 - |amiability|)}{4} \quad (7)$$

Panel (b) of Table 7.2 displays the values for *net amiability* (using equation 5 or equation 7) for different levels of *amiability* and the blowback factor (*b*).

c) Importance

importance measures the extent to which the other country cares about the issue. The influence function ensures that U.S. influence decreases as importance of the issue to the country the United States is trying to influence increases, as those countries with stronger ideological reasons underpinning their ideal point are less likely to be influenced. Conversely, the function ensures that U.S. influence is stronger over those countries who do not consider the issue to be of great import.

importance is a function of a country's treatment toward the ICC (whether the country has ratified the Rome Statute, including whether it was one of the first 60 countries to do so,⁴⁵⁰ signed but not ratified it, or rejected it at Rome), a country's response to U.S. Article-98 agreements (whether the country has signed one, given it force through ratification or some other means, rejected it, or lost aid as a result of refusing to sign), whether the country nominated a judge in the court's first two sets of

⁴⁵⁰ The ICC did not come into being until 60 countries ratified the Rome Statute, which caused being a member of the first 60 countries to be a point of pride for those countries.

elections, and whether the country had been involved in a war in the previous ten years. *importance* was scaled linearly to have a minimum value of 1 and a maximum value of 10. For example, Djibouti, which is party to the ICC, but has signed an Article-98 agreement that is not in force, has not nominated a judge to the ICC, and has not been involved in a war in the last ten years, has a scaled importance score of 1.75. In contrast, Germany, which was one of the first 60 countries to become a party to the ICC and has publicly rejected an Article-98 agreement, has nominated a judge, and has been in a war in the last ten years, has a scaled importance score of 8.5. Figure 7.4 displays the distribution of countries' scaled importance scores.

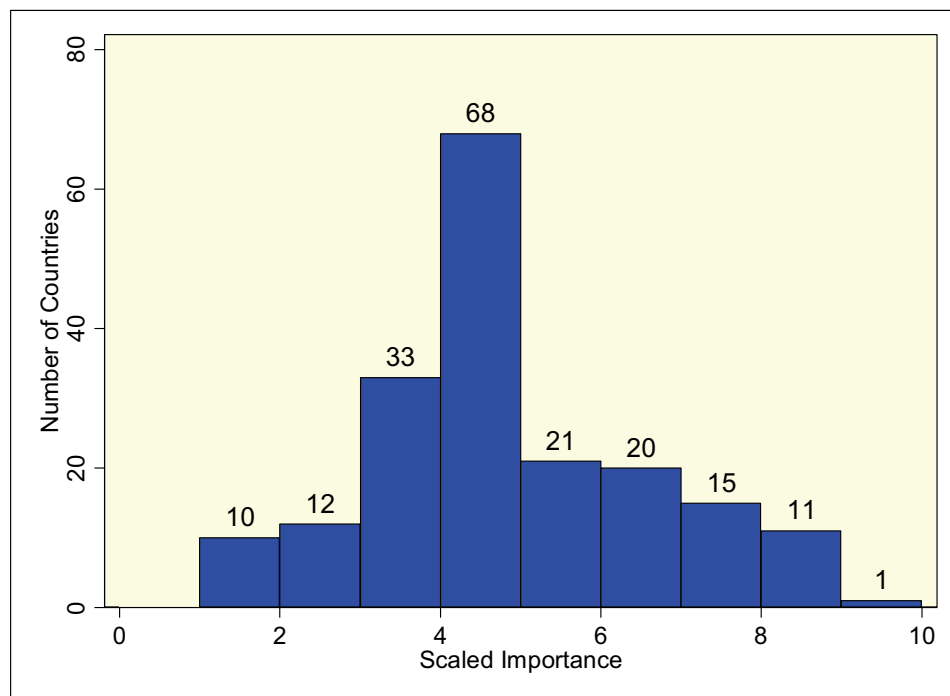


Figure 7.4:
Distribution of Countries' Scaled Importance Scores

d) The Final Influence Function

The above functions are incorporated into the influence function from equation 1 to construct the final influence function. The normalizations of the variables discussed in this section that are elements of the influence function caused influence scores for most countries to fall between -1 and 1 , so that influence would act as a positive or negative percentage movement of the *genview* score of the judges who countries nominate or vote for, as depicted in Figure 7.1 and described in the accompanying text. For example,

when like-minded and opposing countries do not attempt to exert influence, only 9 of 190 countries had an influence score that exceeded 1. None had an influence score below -1 . Given the sparse number of countries for which the influence score exceeded the feasible bounds for being treated as a percentage, the distribution was truncated so the scores for those countries were set to equal 1 or -1 . Figure 7.5 shows the distribution of countries' truncated influence scores when like-minded and opposing countries do not attempt to influence the process.⁴⁵¹

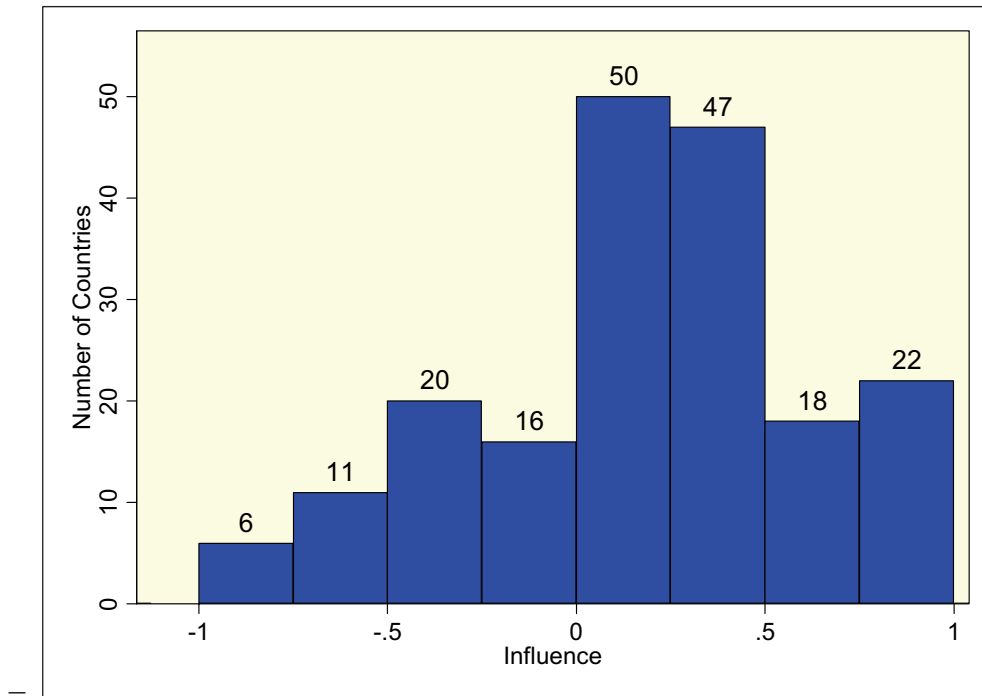


Figure 7.5:
Distribution of Countries' Influence Scores

e) The Effect of Influence

With the function for *influence* defined, it must then be applied to affect a country's nomination, vote, or both. As discussed previously, absent attempts to influence it, a country will attempt to nominate and vote for judges whose perceived ideology (*genview*) equals or is as close as possible to the country's ideal point. *influence* affects which judges countries nominate, vote for, or both such that the targeted

⁴⁵¹ The distribution would change if like-minded or opposing powers attempt to exert influence.

perceived ideology (*genview*) of a judge by a country that has been influenced is a result of the following function:

$$genview = country\ ideal\ pt - (country\ ideal\ pt - US\ ideal\ pt) * influence \quad (8)$$

As depicted in Figure 7.1, this function allows influence to reduce a percentage of the difference between the U.S. ideal point and the ideal point of the country that the United States is attempting to influence.

4. Simulating Nominations⁴⁵²

Every three years, there are six judicial vacancies to fill. The first step in the election process is for countries to nominate judges. This section discusses how the model generates the pool of judicial nominees in the base case, in the case in which the United States attempts to influence the nominations process, and variants of the latter.

a) General Rules for the Nominations Process

The rules the model uses to simulate judicial nominations reflect both the actual rules for judicial nominations as set forth by either the Rome Statute or the Assembly of State Parties, and the probabilities of judges having certain characteristics as evidenced from the first election.

The first step is to determine the potential nominating countries. Only State Parties may nominate judges.⁴⁵³ Because no two judges may be nationals of the same state,⁴⁵⁴ all State Parties with a national that will remain on the court are removed from the pool of potential nominating countries. At every election, 12 judges remain on the court. Thus the pool consists of n minus 12 countries where n equals the number of Party States. For example, currently, there are 100 State Parties. If that number stays static, the next election would have 88 nations in the nominating pool.⁴⁵⁵ The probability with

⁴⁵² The following two sections discuss policies centered around influencing the nominations and elections process. An additional policy variable, whether the United States joins the ICC, is discussed separately.

⁴⁵³ Rome Statute, *supra* note 3, art. 36(4).

⁴⁵⁴ *Id.* art. 36(7).

⁴⁵⁵ One of the aspects of uncertainty the simulation explores is the effect of other nations joining the court. Thus, the model does not assume that this number remains static.

which a country nominates a judge is derived what occurred during the first election. There were 85 State Parties at the time of the first election, 44 of which nominated judges (one of whom was withdrawn prior to the election). Based on this, each country remaining in the pool nominates a judge with a probability equal to 0.5.⁴⁵⁶ This probability could change as one of the policies the United States may attempt is to affect whether certain countries nominate judges.

In generating the nominees, the model also generates nine characteristics that define all judges: (1) nation of which the judge is a national, (2) from which region the judge hails, (3) the judge's gender,⁴⁵⁷ (4) whether the judge is from list A or B,⁴⁵⁸ (5) the judge's perceived general ideology (*genview*), (6) whether the judge was politically active or a political employee, (7) whether the judge had been a judge before he was nominated to the court, (8) whether the judge had published writings or delivered speeches of note before he was nominated,⁴⁵⁹ and (9) remaining years in office.

With the exception of a nominee's perceived ideology (*genview*), which is a result of equation 8 above, a nominee's characteristics are generated probabilistically based on the probabilities calculated from the first election. The probability that a nominee had been a judge and the probability that a nominee had been politically active or a political appointee (characteristics 6 and 7) are assessed jointly. Thus, there are four possibilities: (1) a nominee is a judge *and* politically active or a political appointee ($p = 0.1818$), (2) a nominee is politically active or a political appointee but not a judge ($p = 0.2955$), (3) a nominee is a judge but not politically active or a political appointee ($p = 0.4091$), and (4)

⁴⁵⁶ Forty-four of 85 equals 0.52, which is rounded to 0.5. Countries from particular regions showed no greater or less propensity to nominate judges. There were 11 nominations from 21 African countries, six nominations from 11 Asian countries, seven nominations from 12 Eastern European countries, 8 nominations from 16 Latin American and Caribbean countries, and 12 nominations from 25 Western European and other countries.

⁴⁵⁷ Criteria 2 and 3 need to be accounted for because some voting rules are based on the number of judges of each gender and region in an effort to have gender and regional diversity among judges. See *supra* section entitled, "Non-Binding (Aspirational) Constraints."

⁴⁵⁸ All nominees are to appear on either list A or list B. *Id.* art. 36(5). List A contains those who have established competence in criminal law and procedure. *Id.* art. 36(3)(b)(i). List B contains those who have established competence in relevant areas of international law. *Id.* art. 36(3)(b)(ii). Voting rules also depend on the number of judges from List A and B.

⁴⁵⁹ Criteria 6, 7, and 8 are used by the predictive model from the first stage of the analysis to predict a judge's judicial behavior.

a nominee is neither a judge nor politically active or a political appointee ($p = 0.1136$). The remaining nominee characteristics are assessed individually. The probability a nominee has published writings or delivered speeches is 1.0.⁴⁶⁰ There is an equal probability a nominee is on list A and list B (0.5 for each).⁴⁶¹ The probability a nominee is male equals 0.75. Thus, the probability a nominee is female equals 0.25.⁴⁶² The probabilities that a nominee has the above characteristics are one of the uncertainties listed in the Exogenous Uncertainties section of Table 7.1. Unlike the other uncertainties the Table identifies, the simulation did not explore variations in these probabilities.

b) Generating the Pool of Nominees

The simulations generates pools of nominees under the base case and various U.S. policies.

(1) The base case

The base case represents what would transpire without the United States utilizing any policy lever. It shows the future results of the status quo. Thus, the pool of nominees is generated according to the rules described in the preceding section and the assumption that a country's nominee has a perceived ideology (*genview*) equal to the country's ideal point.

⁴⁶⁰ In the first election, 93.18 percent (all but 3) of the nominees' supporting documentation made clear that the nominee had had writings and speeches. Why the documentation of those three did not indicate writings and speeches is unclear. It may have been that the nominees actually lacked writings and speeches. It also may have been that the documentation merely was insufficient and failed to indicate the nominees' writings and speeches. The latter is a possibility given that the supporting documentation for those nominees seemed less comprehensive than the documentation for the others. Regardless, none of those three were elected. This makes it more likely that future nominees will have published writings or delivered speeches and that those are clearly noted in the nominees' supporting documentation, which supports treating as a certainty the probability that a nominee has published writings or delivered speeches.

⁴⁶¹ Twenty-two of the 44 nominees had been placed on List A and 22 of the 44 nominees had been placed on list B.

⁴⁶² Ten of the original 44 nominees are female. This probability was rounded up slightly to 0.25.

(2) Policy 1: Attempt to Influence who a Country Nominates

Under policy 1, the United States attempts to influence the type of judge a country nominates, with the perceived ideology of a nominated judge following equation 8.

(3) Policy 2: Attempt to Influence Whether a Country Nominates a Judge

In the base case, a country nominates a judge with a probability of 0.5. Under this policy, the United States influences countries to nominate a judge. The effect of U.S. influence here is similar to the effect described above and shown in equation 8. U.S. influence reduces the difference between a country nominating a judge with certainty (probability = 1.0) and the probability of a country nominating a judge without U.S. influence (0.5). Specifically, the probability of a country nominating a judge follows the following formula:

$$\text{Pr}(\text{nomination}) = \text{initial probability} - (\text{initial probability} - \text{certainty}) * \text{influence} \quad (9)$$

Plugging in the values for *initial probability* (0.5) and *certainty* (1.0) results in the following formula:

$$\text{Pr}(\text{nomination}) = 0.5 + 0.5 * \text{influence} \quad (10)$$

There are two added caveats here. First, the United States only exerts influence under this policy if the target country would nominate a judge whose perceived ideology (*genview*) is (1) less than the ideal point of the United States, or (2) does not exceed the U.S.'s ideal point by more than 0.4. This reflects that the United States would only want countries to nominate judges if those judges have perceived ideologies close to the U.S. ideal point.

Second, the model is constructed so that the United States only influences a country to nominate a judge if the United States has positive influence. Applying the formula above to a country over which the United States has negative influence would make it less likely the country would nominate a judge. Since countries that would respond negatively to U.S. efforts would probably not be less likely to nominate a judge, the formula should not be applied in that instance.

(4) Policy 3: Attempt to influence both who a Country Nominates and whether a Country Nominates a Judge

This policy is merely a combination of policy 1 and policy 2. It is mentioned explicitly to make clear that those policies are not mutually exclusive.

5. Simulating Elections

Once the pool of nominees is set, the election occurs. This section describes the simulation's general voting rules, binding and non-binding constraints on votes established by the Rome Statute and the Assembly of State Parties, the policy intervention of the United States affecting for which judges a country votes, and some uncertainties on which votes may turn.

a) Basic Voting Rules

The simulation is composed of several rules that jointly constrain and determine for which nominees a country votes. Some rules are imposed by either the Rome Statute or the Assembly of State Parties. These rules contain footnotes citing to their authority. Others are created to model how a country's votes reflect its preferences.

(1) Basic Voting Rules from the Rome Statute or Assembly of State Parties

Only State Parties vote for judges.⁴⁶³ In each election, each State Party has six votes, one for each vacancy.⁴⁶⁴ Judges that receive a two-thirds majority of votes from the State Parties are elected.⁴⁶⁵ If more judges receive a two-thirds majority of votes than there are vacancies, those who receive the most votes are elected.⁴⁶⁶ If not all vacancies are filled, voting proceeds to a subsequent round.⁴⁶⁷ The country's number of votes in

⁴⁶³ Rome Statute, *supra* note 3, art. 36(6)(a).

⁴⁶⁴ *Nomination and Election Procedure*, *supra* note 291, at ¶ 20.

⁴⁶⁵ Rome Statute, *supra* note 3, art. 36(6)(a).

⁴⁶⁶ *Id.*

⁴⁶⁷ *Id.* art. 36(6)(b).

subsequent rounds is reduced by the number of vacancies filled in previous rounds.⁴⁶⁸ Thus, a country always has a number of votes equal to the number of vacancies.

(2) Basic Voting Rules of the Model: For Whom Countries Vote

To decide for which nominees to vote, each State Party ranks judges according to the least absolute deviation between the country's ideal point (as adjusted by U.S. influence) and the judge's perceived ideology (*genview*). Each State Party then votes for its six top-ranked *eligible* nominees.⁴⁶⁹

Any judge who receives fewer than ten votes or the fewest number of votes in a round drops out of the next round with probability equal to 0.5. This rule is supplemented by a drop-out rule discussed at the end of the subsequent section ("Voting Constraints").⁴⁷⁰

b) Voting Constraints

Voting constraints are either binding or non-binding. The binding constraints are those the Rome Statute imposes. They may not be relaxed in an election and every election must enforce them unless they are modified via the process of amending the Rome Statute. Non-binding constraints emanate from goals—primarily, gender and regional diversity—the Rome Statute sets forth without setting forth firm rules to achieve those goals (as it does for the binding constraints).⁴⁷¹ To meet the Rome Statute's aspirations, the Assembly of State Parties created additional constraints whose rules allow for them to be relaxed (the non-binding constraints).

(1) Binding Constraints

At least nine of the court's 18 judges must come from list A (those having established competence in criminal law and procedure) and at least five judges must

⁴⁶⁸ *Nomination and Election Procedure*, *supra* note 291, at ¶ 20.

⁴⁶⁹ A country may not be able to vote for its top six-ranked nominees given the voting constraints discussed below.

⁴⁷⁰ See *infra* text accompanying notes 482 to 483.

⁴⁷¹ Rome Statute, *supra* note 3, art. 36(8)(a).

come from list B (those having established competence in relevant areas of international law).⁴⁷² Thus, on each ballot, a country must vote for at least nine minus the number of list A judges remaining in office or elected in previous rounds and five minus the number of list B judges remaining in office or elected in previous rounds.⁴⁷³ For example, if there were five judges remaining on the bench from list A, each country must vote for at least four judges from list A. If two judges from list A were elected in earlier rounds, meaning there are now seven judges from list A on the bench (five whose terms did not expire plus the two newly elected), each judge must vote for at least 2 judges from list A. The final simulation model did not account for this rule because it does not affect results (the ideal points of judges elected to the bench). Whether a judge is on list A or B does not correlate with countries' ideal points, judges' general ideologies, or any other judicial characteristics that affect judicial behavior. As such, the constraint served only to complicate the simulation without affecting what is being modeled.

(2) Non-Binding (Aspirational) Constraints

The non-binding (aspirational) constraints are imposed by the Assembly of State Parties (ASP) and may be relaxed under the circumstances provided.

There must be at least six judges of each gender.⁴⁷⁴ Thus, on each ballot, a country must vote for at least six minus the number of male judges remaining in office or elected in previous rounds.⁴⁷⁵ A country must also vote for at least six minus the number of female judges remaining in office or elected in previous rounds.⁴⁷⁶ This constraint may be relaxed due to a limited number of nominees of a particular gender. Table 7.3 shows the circumstances by which the gender constraint is relaxed

⁴⁷² Rome Statute, *supra* note FN1, art. 36(5).

⁴⁷³ *Nomination and Election Procedure*, *supra* note 291, at ¶ 20(a).

⁴⁷⁴ *Nomination and Election Procedure*, *supra* note 291, at ¶ 20(c).

⁴⁷⁵ *Id.*

⁴⁷⁶ *Id.*

Table 7.3:⁴⁷⁷
Relaxation of Gender Voting Constraint

| Number of nominees of one gender | Minimum voting requirement <u>shall not exceed</u> |
|--|--|
| 10 | 6 |
| 9 | 6 |
| 8 | 5 |
| 7 | 5 |
| 6 | 4 |
| 5 | 3 |
| 4 | 2 |
| 3 | 1 |
| 2 | 1 |
| 1 | 0 |

To illustrate, suppose only two female judges remain on the court. Each country should vote for at least four female judges. If, however, there are only five female nominees, then the requirement drops to three female judges. If there are only three female nominees, then each country must vote for at least one female judge. The final simulation model did not account for this rule for reasons similar to those that justified excluding the list A and B rule. A judge's gender does not correlate with countries' ideal points, judges' general ideologies, or any other judicial characteristics that affect judicial behavior. As such, this constraint should not affect results.

The ASP also imposed a regional constraint. State Parties are placed in one of five regions: (1) Africa, (2) Asia, (3) Eastern Europe, (4) Latin America and Caribbean, and (5) Western Europe and Other Countries. If the number of countries from a region is greater than three-eighths of the total number of State Parties, there must be at least three judges from that region.⁴⁷⁸ If the number of countries from a region is less than

⁴⁷⁷ *Id.* at ¶ 20(a).

⁴⁷⁸ This rule was set forth before the first election. *Procedure for the Election of the Judges for the International Criminal Court*, ICC Assembly of State Parties, 1st Sess., at ¶ 3(b), ICC-ASP/1/Res.3 (2002). Before the second election, the ASP did not mention the three-eighths formula. Instead, it stated that if the number of states from a region exceeded 16, then there must be at least three judges from that region. *Nomination and Election Procedure*, *supra* note 291, at ¶ 20(b). At the time, there were 100 Party States. Three-eighths of 100 equals 16.67. Thus, it appears the ASP applied the three-eighths rule without

three-eighteenths of the total number of State Parties, there must be at least two judges from that region.

Applying the above principles, if a region has greater than three-eighteenths the total number of State Parties, each country must vote for at least three judges from that region minus the number of judges from that region remaining in office or elected in previous rounds. If a region has less than three-eighteenths of the total number of State Parties, each country must vote for at least two judges from that region minus the number of judges from that region remaining in office or elected in previous rounds.

Like the gender constraint above, this constraint may be relaxed. If the number of nominees from a region is not at least double the respective minimum voting requirement, the minimum voting requirement shall be half the number of candidates from that region, rounded up to the nearest whole number.⁴⁷⁹ If there is only one candidate from a region, there shall be no minimum voting requirement for that region.⁴⁸⁰ For example, if there are no judges from the Africa region remaining on the court, Party States must vote for at least three judges from Africa if at least three-eighteenths of the Party States are from Africa. Otherwise, State Parties must vote for at least two judges from Africa. Assume that at least three-eighteenths of the State Parties are from Africa so that each party state must vote for at least three judges from Africa. If there are only five nominees from Africa, the voting requirement is unaltered. (Half of five is 2.5, which is rounded up to three.) If there are only four nominees from Africa, the voting requirement reduces to two. If there are only three nominees from Africa, the voting requirement is also two.

The ASP included a single provision that allows all of the non-binding (aspirational) constraints to be relaxed. If vacancies remain after four rounds of voting, the non-binding constraints (those applying to gender and region) no longer apply.⁴⁸¹

explicitly acknowledging the use of the rule. Therefore, the simulation assumes that the three-eighteenths rule will be applied in future elections.

⁴⁷⁹ *Nomination and Election Procedure*, *supra* note 291, at ¶ 20(b).

⁴⁸⁰ *Id.*

⁴⁸¹ *Id.* at ¶ 21.

The ASP also made a rule mandating the removal of nominees from consideration that links to the binding and non-binding constraints. Once gender and regional voting requirements no longer apply (either because they have been met or the fourth round has been completed without them having been met) and the lists A and B requirements are fulfilled, the candidate (or, in the event of a tie, candidates) receiving the fewest number of votes, shall be excluded from the next round.⁴⁸² However, this rule only applies if the number of nominees remains at least twice the number of vacancies.⁴⁸³ For example, if two vacancies remain, the nominee receiving the fewest number of votes must be excluded from the next round if at least four nominees will remain.⁴⁸⁴

c) Generating the ICC's Judicial Body

Judicial bodies are generated under the base case, the United States attempting to influence for which judges a country votes, and variations of the two.

(1) The Base Case

The base case proceeds as described under the voting rules given the voting constraints.

(2) Policy 4: Attempt to influence for which Nominees a Country Votes

In the base case, countries rank judges according to the least absolute deviation between the judge's *genview* and the country's ideal point. Under this policy, the United States influences for which nominees a country votes by influencing their ideal point for purposes of voting so that when a country ranks judges, the country does not use its ideal point in calculating the least absolute deviation. Instead, it adjusts its ideal point as a function of the influence the United States has. Specifically:

⁴⁸² *Id.* at ¶ 23.

⁴⁸³ *Id.*

⁴⁸⁴ Because neither gender nor whether a judge appears on List A or List B is known to be correlated with a particular country, judicial reputation, or the extent to which judicial performance accords with pre-judicial reputation, this constraint does not affect the types of judges that would be elected or their performance. Thus, the model did excluded these constraints.

$$\text{adjusted ideal point} = \text{country ideal pt} - (\text{country ideal pt} - \text{US ideal pt}) * \text{influence} \quad (11)$$

This is the same function used in equation 8 to calculate the new *genview* of a country's nominee.

(3) Allowing for the Effect of Secrecy

There is one critical distinction between U.S. influence over voting and U.S. influence over nominations, and this distinction adds an additional element of uncertainty to explore. Nominations are public but votes are secret. A country may appear, even promise, to yield to U.S. influence in voting for a judge, but because the votes are secret, there is some probability the country will cheat. This cheat factor likely only affects the influence due to power (*net comparative power*). Countries are not likely to cheat on influence due to amiability. To operationalize this possibility, the simulation sets *net comparative power* equals to zero if a country cheats. Two values for the cheat factor will be explored: 0 and 0.33, where the cheat factor indicates the probability that a country will cheat. Thus, when the cheat factor equals zero, no countries cheat. When the cheat factor equals 0.33, a random draw of 33 percent of the countries cheat.

(4) Allowing for a Regional Preference in Voting

Countries rank judges according to the least absolute deviation between the judge's *genview* and the country's ideal point (or adjusted ideal point as shown in equation 11). To account for a regional preference, each country reduces the absolute deviation for every judge from the same region as that country by some percentage, *RP*. Then the country ranks judges according to their least absolute deviation with the adjustment for regional preference. Two different values for *RP* will be analyzed: 0 and 0.2 (where 0 indicates no regional preference).

d) Interaction of Nomination and Election Policies

The policies regarding nomination (policies 1, 2, and 3) and election (policy 4) are not mutually exclusive. That is the election policy may be pursued jointly with or without any of the nomination policies. In all, there are six policies to explore:

1. US does not influence any countries

2. US influences who a country nominates
3. US influences who a country nominates and whether a country nominates a judge
4. US influences only for whom a country votes
5. US influences who a country nominates and for whom a country votes
6. US influences who a country nominates and whether a country nominates a judge and for whom a country votes

6. Variations on Attempts of Like-Minded and Opposing Powers

The function for *net comparative power* (equation 2), and thus *influence*, depends on the power like-minded and opposing countries have over the country being influenced, but it is not apparent that like-minded and opposing countries will also attempt to influence the nominations and elections process. This uncertainty is explored by allowing for four possibilities:

1. Neither like-minded countries nor opposing countries lobby.
2. Like-minded countries lobby but not opposing countries
3. Opposing countries lobby but not like-minded countries
4. Like-minded countries and opposing countries lobby

Although there are myriad combinations of countries that have similar and opposing views as the United States on the ICC, to make investigating this possibility tractable, only the permanent members of the Security Council are considered with the inclusion of Germany.⁴⁸⁵ Thus, China, Russia, and the UK are considered like-minded powers, whereas France and Germany are considered opposing powers.

7. Initial Conditions

The model's initial conditions must be set to account for the current judicial body and the initial values for the variables in the influence function.

⁴⁸⁵ Germany's history of support for the ICC coupled with its concert of action with France and its power in the EU warrant its inclusion.

a) The Current Judicial Body

To populate the model to account for its current makeup, the characteristics of the current judges are coded based on the biographical documentation the nominating countries forwarded to the Assembly of State Parties to support their nomination. Each judge on the ICC has been coded to account for the judge characteristics the model employs.⁴⁸⁶ Table 7.4 presents this information, as well as in which Chamber—Pre-Trial, Trial, or Appellate—each judge serves.⁴⁸⁷

**Table 7.4:
Current ICC Judicial Body**

| Last Name | Country | Region | Pol. Active or Pol. Appt. | Judge | Writings and Speeches | List A/B | Gender | Years Remaining | Chamber |
|-----------------|-------------------|--------|---------------------------------|-------|-----------------------------|-------------|--------|--------------------|-----------|
| Diarra | Mali | 1 | 1 | 1 | 1 | A | F | 6 | Pre-Trial |
| Jorda | France | 5 | 0 | 1 | 1 | A | M | 3 | Pre-Trial |
| Kaul | Germany | 5 | 1 | 0 | 1 | B | M | 9 | Pre-Trial |
| Kuenyechia | Ghana | 1 | 0 | 0 | 1 | B | F | 9 | Pre-Trial |
| Politi | Italy | 5 | 1 | 1 | 1 | B | M | 3 | Pre-Trial |
| Steiner | Brazil | 4 | 0 | 1 | 1 | A | F | 6 | Pre-Trial |
| Trendafilova | Bulgaria | 3 | 0 | 0 | 1 | A | F | 9 | Pre-Trial |
| Blattman | Bolivia | 4 | 1 | 0 | 1 | B | M | 3 | Trial |
| Clark | Ireland | 5 | 0 | 1 | 1 | A | F | 6 | Trial |
| Fulford | United Kingdom | 5 | 0 | 0 | 1 | A | M | 6 | Trial |
| Hudson-Phillips | Trinidad & Tobago | 4 | 1 | 0 | 1 | A | M | 6 | Trial |
| Odio-Benito | Costa Rica | 4 | 1 | 1 | 1 | A | F | 6 | Trial |
| Usacka | Latvia | 3 | 0 | 1 | 1 | B | F | 9 | Trial |
| Kirsch | Canada | 5 | 1 | 0 | 1 | B | M | 3 | Appeals |
| Kourula | Finland | 5 | 0 | 1 | 1 | B | M | 9 | Appeals |
| Pikis | Cyprus | 2 | 0 | 1 | 1 | A | M | 3 | Appeals |
| Pillay | South Africa | 1 | 0 | 1 | 1 | B | F | 3 | Appeals |
| Song | South Korea | 2 | 0 | 0 | 1 | A | M | 9 | Appeals |

b) Initial Values for Variables

Initial conditions for the variables in the influence function (*U.S. power, like-minded power, opposing power, amiability, and importance*) as well as each country's

⁴⁸⁶ As discussed earlier, those characteristics are: (1) nation of which the judge is a national, (2) from which region the judge hails, (3) the judge's perceived general ideology (*genview*), (4) whether the judge was politically active or a political employee, (5) whether the judge had been a judge before he was nominated to the court, (6) whether the judge had published writings or delivered speeches of note before he was nominated, and (7) remaining years in office.

⁴⁸⁷ The Appeals Chamber must be composed of the judge the other judges designate to be the President of the court and four other judges. Rome Statute, *supra* note 3, arts. 38(1), 39(1). The Pre-Trial Chamber and the Trial Chamber each must be composed of at least six judges. *Id.* art. 39(1). Thus, one will have six judges and the other will have seven.

ideal point were estimated. The derivation of the values for the components of the influence function and some of their summary statistics were presented earlier in this Chapter.

A country's unscaled ideal point was a function of its actions regarding the ICC and whether the country has or had troops serving in the Iraq war, which serves as a proxy for the country's position on the rightness and legality of the use of force in a controversial context. Specifically, the function is as follows:

$$\begin{aligned} \text{unscaled ideal point} = & 1 * (\text{ICC Party State}) + 0.5 * (\text{like - minded country}) \\ & + 1 * (\text{publicly rejected signing an Article - 98 agreement}) + \\ & - 0.25 * (\text{signed but did not ratify the Rome Statute}) + \\ & - 1 * (\text{did not sign the Rome Statute}) + - 0.25 * (\text{voted against the Rome Statute}) \\ & + - 0.5 * (\text{signed an Article - 98 agreement that is not in force}) \\ & + - 1 * (\text{signed an Article - 98 agreement that is in force}) + - 1 * (\text{troops in Iraq}) \end{aligned}$$

Countries' ideal points are scaled differently depending on whether the country had troops in Iraq and whether the ideal point was positive (liberal) or negative (conservative). Specifically, if a country had a positive ideal point, the country's ideal point was divided by the maximum possible ideal point (2.5). If a country had a negative ideal point and had troops in Iraq, the country's ideal point was divided by the absolute value of the minimum possible ideal point (3.25). If a country had a negative ideal point and did not have troops in Iraq, the country's ideal point was divided by the absolute value of the minimum country ideal point (3.25) reduced by one (2.25).

Dividing by the maximum and minimum possible values places ideal points on a spectrum that ranges from -1 (most conservative) to 1 (most liberal). The scaling procedure allows the *troops in Iraq* variable to give those countries that have troops in Iraq a more conservative ideal point but does not affect those countries that do not have troops in Iraq (does not make them more liberal or less conservative). The rationale is that countries that have or had troops in Iraq signaled a more ideologically conservative view of the rightness or legality of the use of force, which justifies a more conservative ideal point score. Conversely, countries may not have or have had troops in Iraq for myriad reasons ranging from ideological disagreement to lack of an ability to project power, to the desire to free ride off other countries' efforts in Iraq regardless of the

country's ideological position. This justifies giving no effect to a country's decision to not commit troops in Iraq. Figure 7.6 shows the distribution of countries' ideal points.

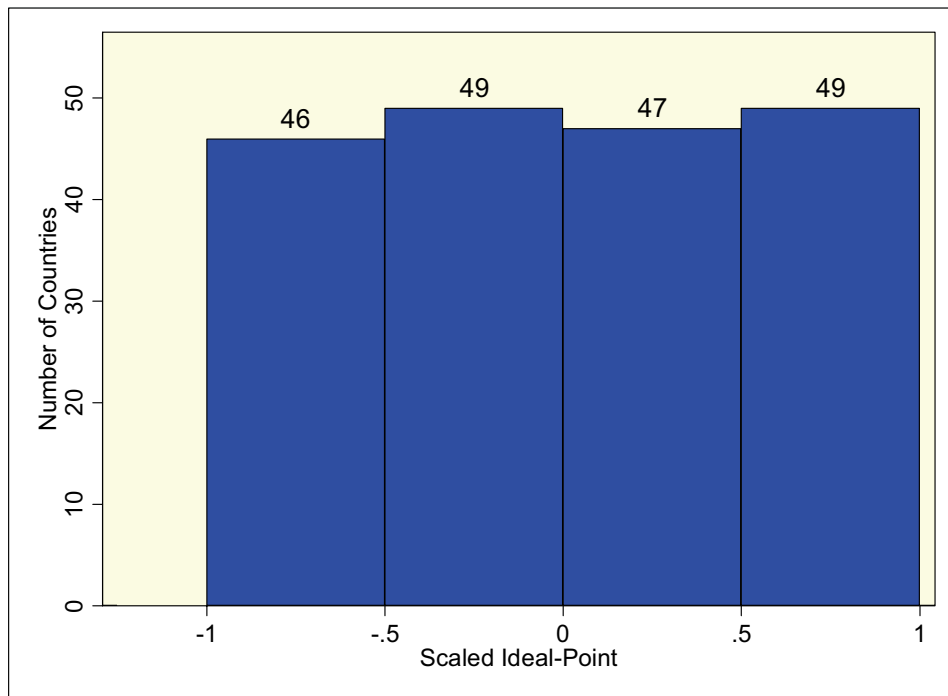


Figure 7.6:
Distribution of Countries' Scaled Ideal points

8. Repeated Runs to Explore Effect of Different Scenarios and Policies

Whether a country joins the court and country values for any of the variables upon which nominations and votes depend could change, all of which may cause the nomination pool and elected judicial body to change. To explore the effects of this uncertainty, ICC membership and variable values and systematically varied.

a) Which Countries Join the Court

To examine the effects of different countries joining the court, countries are categorized by their ideal points and their importance. Five categories for ideal point were created: strongly conservative (-2), moderately conservative (-1), moderate (0), moderately liberal (1), and strongly liberal (2). Three categories were created for

importance: little importance (1), moderate importance (2), and great importance (3). The number of countries in each category is displayed in Table 7.5.⁴⁸⁸

Table 7.5:
Countries in Each Ideal Point and Importance Category

| | | Importance Category | | | |
|----------------------|-------|---------------------|-----|----|-------|
| | | 1 | 2 | 3 | Total |
| Ideal Point Category | -2 | 0 | 27 | 2 | 29 |
| | -1 | 13 | 36 | 0 | 49 |
| | 0 | 36 | 18 | 1 | 55 |
| | 1 | 6 | 11 | 5 | 22 |
| | 2 | 0 | 17 | 18 | 35 |
| | Total | 55 | 109 | 26 | 190 |

Table 7.5 illustrates a logical relationship between ideal point and importance: those countries that have ideal points toward the ideological extremes tend to place a higher importance on the issue, whereas those countries that are more neutral about the court tend not to consider the issue to be very important. Figure 7.7, which displays a graph of each country's ideal point and importance also reveals this logical relationship.

⁴⁸⁸ Table 7.3 excludes the United States. The United States was not categorized for purposes of exploring the effects of countries within each category joining the court because the effect of the United States joining the court was assessed separately; however, the United States would fall within ideal point category -2 and importance category 3.

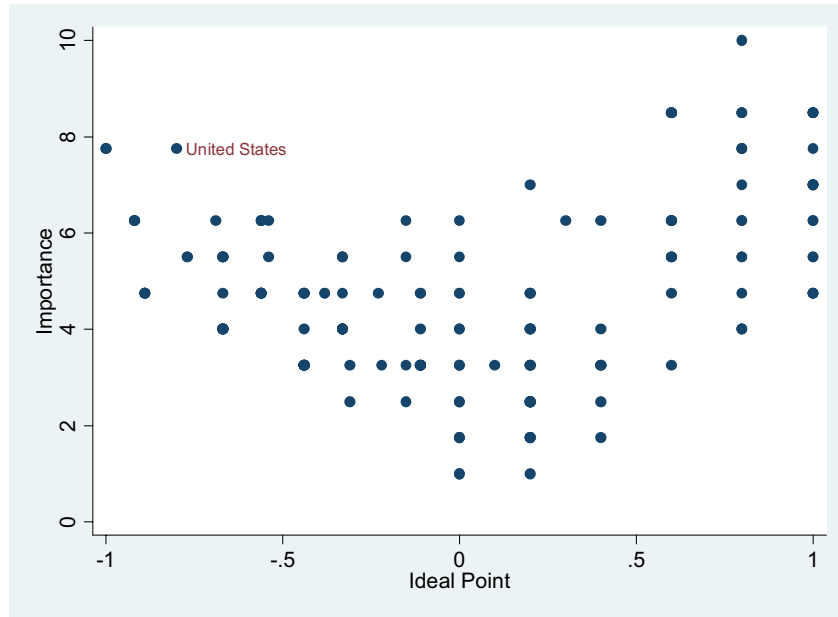


Figure 7.7:
Countries' Ideal Points and Importance

Of note is that only two countries (excluding the United States) have a strongly conservative ideal point and placed great importance on the issue whereas many more countries have a strongly liberal ideal point and great importance. This may reflect that although many countries had strongly conservative views of the role of the court, few of those countries have the ability to project power. Thus, few felt that the court could pose any threat to them, so they did not take action indicating the importance with which they consider the issue. Another rationale is that there are more opportunities for a country that has a liberal view of the court to act in a way that establishes the importance with which it views the issue than there are for a country that has a conservative view of the court (or is generally opposed to it). For example, a country that has a liberal view and feels strongly about the issue may join the court, reject signing an Article-98 agreement, and nominate a judge, whereas a country with a conservative view that feels strongly about the issue may be do nothing more than distance itself from the court by not engaging at all. Thus, the data may understate the importance score of those with a conservative ideal point. If so, this bias will likely have little effect on the results. As Table 7.6 indicates, most of those states that have a strongly conservative or moderately conservative view of the court are not party to the ICC. Therefore, slightly biased

measures of their importance will not affect the court's judicial composition. Even if those states were to join the court and their importance scores are biased towards lower importance, this makes them more susceptible to the United States influencing them to act (nominate or vote) more conservatively. Since these states are already strongly conservative, this bias has little effect.

Table 7.6:
Ideal Point Categories and State Parties

| | | State Party | | |
|----------------------|-------|-------------|-----|-------|
| | | No | Yes | Total |
| Ideal Point Category | -2 | 29 | 0 | 29 |
| | -1 | 47 | 2 | 49 |
| | 0 | 13 | 42 | 55 |
| | 1 | 1 | 21 | 22 |
| | 2 | 0 | 35 | 35 |
| | Total | 90 | 100 | 190 |

The natural groupings of ideal point and importance categories, which is apparent from Table 7.5 allow for countries to be categorized by these two variables. Specifically, four categories are created: countries with a (1) moderate or nearly moderate ideal point and little importance, (2) moderately or strongly conservative ideal point and moderate or great importance, (3) moderately or strongly liberal ideal point and moderate or great importance, and (4) moderate ideal point and moderate or great importance. Table 7.7 replicates Table 7.5 and displays how countries are categorized into ideal point-importance categories.

Table 7.7:
Categorization of Countries in Each Ideal Point and Importance Category

| | | Importance Category | | | |
|----------------------|-------|---------------------|-----|----|-------|
| | | 1 | 2 | 3 | Total |
| Ideal Point Category | -2 | 0 | 27 | 2 | 29 |
| | -1 | 13 | 36 | 0 | 49 |
| | 0 | 36 | 18 | 1 | 55 |
| | 1 | 6 | 11 | 5 | 22 |
| | 2 | 0 | 17 | 18 | 35 |
| | Total | 55 | 109 | 26 | 190 |

Table 7.8 displays the number of countries in each ideal point-importance category by whether they are state parties. The left side of Table 7.8 shows the rules by which countries were categorized into ideal point-importance categories.

**Table 7.8:
Combined Ideal Point-Importance Categories and State Parties**

| Category rules | | | State Party | | |
|----------------|------|---|-------------|-----|-------|
| Id-Point | Imp. | | 0 | 1 | Total |
| >=-1 & <=1 | =1 | 1 | 20 | 35 | 55 |
| <=-1 | >=2 | 2 | 65 | 0 | 65 |
| >=1 | >=2 | 3 | 1 | 50 | 51 |
| =1 | >=2 | 4 | 4 | 15 | 19 |
| Total | | | 90 | 100 | 190 |

Table 7.8 reveals that very few counties in categories three and four have not joined the court, but categories one and two contain several countries that are not State Parties. From this, six scenarios are created that explore the effects of countries in categories one and two joining the court.

1. Status quo (0 category one and 0 category two countries join the court)
2. 10 category one and 0 category two countries join the court
3. 0 category one and 10 category two countries join the court
4. 10 category one and 10 category two countries join the court
5. 0 category one and 30 category two countries join the court
6. 10 category one and 30 category two countries join the court

The effect of the United States joining the court is explored separately.

b) Changes in Ideal Point and Importance

Changes in counties' ideal points and importance scores would likely affect U.S. influence and the ICC's judicial composition. To examine those effects, a few scenarios are explored.

(1) Status Quo

The status quo means there is no change in ideal point or importance.

(2) General Warming to a Court with Broad Reach and Powers

This scenario envisions that countries generally increasingly approve of a court with broad reach and powers. Such a shift in opinion could occur because the court acts in a constrained manner. This could be coupled with or due to ICC success in bringing war criminals to justice. These actions would tend to alleviate concerns about the court, soften opposition, and embolden the proponents of a strong court with broad powers.

In terms of the effect on variables, this scenario envisages a general increase in each country's ideal. Thus, those who have a liberal view of the court (have a positive ideal point) increase their liberalism. Those who have a conservative view of the court move towards having a moderate view. This general shift in opinion, though, does not affect those countries who view the court most conservatively (highly negative ideal point). Their ideal points remain the same. The effect on importance is a function of the effect on ideal point in accord with the natural relationship between the two variables described above. If ideal point moves closer to zero, then importance reduces. If ideal point moves further from zero, then importance increases.

(3) General Increased Opposition to a Court with Broad Reach and Powers

This scenario envisions that countries generally increasingly disapprove of a court with broad reach and powers. Such a shift in opinion could occur because the court begins to act politically or otherwise overstep its proper role.⁴⁸⁹ This would tend to increase concerns about the court, harden opposition, and embolden the opponents of a strong court with broad powers.

In terms of the effect on variables, this scenario envisages a general decrease in each country's ideal point. Thus, those who have a liberal view of the court (have a positive ideal point) move toward having a moderate view. Those who have a conservative view of the court increase their conservatism. This general shift in opinion, though, does not affect those countries who view the court most liberally (highly positive

⁴⁸⁹ This also could cause increased polarization, which is the next scenario discussed, instead of increased opposition.

ideal point). Their ideal points remain the same. The effect on importance is precisely the same as in the scenario described above. If ideal point moves closer to zero, then importance reduces. If ideal point moves further from zero, then importance increases.

(4) General Polarization of Opinion About a Court with Broad Reach and Powers

This scenario envisions that countries generally grow increasingly polarized in their views of a court with broad reach and powers. Such a shift in opinion could occur because the court begins to act politically or expansively. This could increasingly polarize opinion as many who view the court liberally desire for the court to take such a position whereas those who view the court conservatively generally are opposed to such action.

In terms of the effect on variables, this scenario envisages a general decrease in each country's ideal point for those countries whose ideal point is negative and an increase in ideal point for those countries whose ideal point is positive. That is, positive ideal points grow more positive and negative ideal points grow more negative. The effect on importance is precisely the same as in the above scenarios. As each countries ideal point moves farther from zero, importance increases.

c) Changes in Amiability

The general willingness of countries to work with the United States could also change. The simulation considers four patterns of change in addition to the status quo.

1. A general increase.
2. A general decrease.
3. A general polarization. Those who generally view the United States favorably, or at least have worked together historically, increase their favorably view. Those have generally view the United States unfavorably, or at least have not worked together historically, increase their unfavorable view.
4. A dramatic one period decrease in amiability. This is meant to simulate the effect of the United States taking an action that is generally disfavored by much of the world near the time of an election.

d) Changes in U.S. Power

The simulation also explores the effect of changes in U.S. power. Two patterns of change are considered in addition to the status quo.

1. A general increase
2. A general decrease

In either scenario, the changes only occur to a random draw of 50 percent of the countries.

e) Changes in Like-Minded and Opposing Power

The simulation considers changes in like-minded power and opposing power jointly by looking at two patterns of change in addition to the status quo.

1. A general increase in both like-minded and opposing power: This pattern envisages a world in which the big, powerful nations grow more powerful.
2. A general decrease in both like-minded and opposing power: This pattern envisages a world in which power decentralizes and the big, powerful nations lose power.

In either scenario, the changes only occur to a random draw of 50 percent of the countries.

9. Multiple Elections

The next election occurs three years from now ($t+3$), in 2009. The simulation explores six future elections ($t+3$, $t+6$, $t+9$, $t+12$, $t+15$, and $t+18$), which is a total of 54 judges, including the current 18.

10. Measures

The model produces one basic measure that is a combination of over 40 million separate results. First, the predicted ideal point (or judicial behavior) of each judge is assessed. A judge's ideal point is predicted from his *genview* and other characteristics using the regression results from Stage One.

Second, the probability of each judge issuing a liberal ruling on four different types of cases (four different *j*-points, to use the terminology from Chapter Four) is assessed. The cases range in ideological space and have one conservative case and three liberal cases that range from moderately liberal to very liberal (*j*-points = -0.75 , 0.25 , 0.5 ,

0.75). The following formula determines the probability of a judge issuing a liberal ruling:

$$\Pr(y = 1) = \text{logit}^{-1}(\text{logit}(\textit{predicted ideal point}) - \text{logit}(\textit{scaled case } j - \textit{point})) \quad (12)$$

The probability that $y=1$ indicates the probability of a judge issuing a liberal ruling. The *predicted ideal point* for each judge is calculated by applying the Stage One predictive model results to the judges generated by the Stage Two simulation. The *case j-points* are given as discussed above but then linearly scaled so that the minimum value is zero and the maximum value is one.⁴⁹⁰ This places them on the same scale as the *predicted ideal points*. The logit functions convert the *predicted ideal point* of the judge and the *scaled case j-point*, which are reported as probabilities, into indexes (xb values). After the indexes are subtracted from one another, the inverse of the logit function returns the probability of a judge issuing a liberal ruling.

Third, five cut points of a version of a cumulative distribution function of the probability of all possible three-judge panels⁴⁹¹ issuing a liberal ruling on each case are calculated. The cut points are 10 percent, 25 percent, 50 percent, 75 percent, and 90 percent. The 10 percent cut point returns the percentage of all possible three-judge panels that rule liberally with a probability of at least 10 percent. The 50 percent cut point returns the percentage of all possible three-judge panels that rule liberally with a probability of at least 50 percent.⁴⁹²

With 18 judges, there are $C_{18,3}$, which equals 816, possible three-judge panels. For each three-judge panel, there are eight possible voting outcomes, which are displayed in Table 7.9.

⁴⁹⁰ The scaled *j*-points equal 0.125, 0.625, 0.750, and 0.875.

⁴⁹¹ Most issues coming before the pre-trial or trial chamber are to be heard by a three-judge panel. Rome Statute, *supra* note FN1, arts. 39(2)(b)(ii)-(iii), 57(2)(a).

⁴⁹² A cumulative distribution function would report the percentage of panels that have a probability of ruling liberally that is *less than* or equal to the value on the axis (the cut point). This study looks at the percentage of panels that have a probability of ruling liberally that is *greater than* or equal to the value on the axis (the cut point).

Table 7.9:
Possible Voting Configurations for 3-Judge Panels

| # | Judge 1 | Judge 2 | Judge 3 | Outcome |
|---|---------|---------|---------|---------|
| 1 | lib | lib | lib | lib |
| 2 | lib | lib | cons | lib |
| 3 | lib | cons | lib | lib |
| 4 | lib | cons | cons | cons |
| 5 | cons | lib | lib | lib |
| 6 | cons | lib | cons | cons |
| 7 | cons | cons | lib | cons |
| 8 | cons | cons | cons | cons |

Four configurations will result in a liberal ruling: Judges one, two, and three vote liberally (#1); judges one and two vote liberally and judge three votes conservatively (#2); judges one and three vote liberally and judge two votes conservatively (#3); and judges two and three vote liberally and judge one votes conservatively (#5). The formula in equation 12 determines the probability of a judge voting liberally. Applying that formula to each judge and then multiplying the individual probabilities to get the joint probability returns the probability of any of the above voting configurations. Adding the probability of each of these voting configurations returns the probability of this particular panel voting liberally on a particular case. Applying this method to each of the 816 possible three-judge panels can produce the values at the cut points for each type of case within each scenario. When discussing results that span several scenarios, the average percent of panels that have the given probability of issuing a liberal ruling is reported.

Fourth, the five cut points referenced above of a cumulative distribution function of the probability of all possible five-judge panels issuing a liberal ruling on each case are created. With 18 judges, there are $C_{18,5}$, which equals 8,568, possible five-judge panels. The histograms are created by calculating the joint probability of all possible voting configurations. On a three-judge panel, four different voting configurations can lead to a particular (in this case, liberal) ruling. On a five-judge panel, 16 different voting configurations can lead to a particular ruling. Nonetheless, the same method is applied. The joint probability of each of the 16 voting configurations is calculated and added together to determine the overall probability of that particular panel voting liberally on a particular type of case. This method is applied to each of the 8,568 possible five-judge panels to produce the values at the cut points for each type of case.

The possible panels of judges span seven time periods, t_0 through $t+6$. When calculating all the possible panels of judges, two different spans of time (hereinafter referred to as slates of judges) are considered: judges from all time periods and judges from only $t+4$ through $t+6$.

All possible combinations of the inputs results in 518,400 separate scenarios, or states of the world.⁴⁹³ For each scenario, an output measure is calculated for five probability cut points across four types of cases (j -points), two panels (three-judge and five-judge), and two slates of judges (judges from all time periods and from only the last three time periods). Thus, for each of the over 500,000 situations, there are 80 outputs, which results in a total of over 40 million separate results. Chapter Eight, which reviews the results, discusses the construction of other measures from the measure discussed herein and their policy relevance.

⁴⁹³ For each scenario, judges may rule on salient or non-salient cases, but only salient cases are considered.

CHAPTER EIGHT: STAGE TWO RESULTS

I. Introduction

This Chapter analyzes the results from the simulation. The first section discusses outcome measures and data. The second section assess the effect of the various policies and suggests which may be most favored and most robust to uncertainty. The following section discusses how variation in the variables most central to a nation's actions and attitudes toward the ICC has the largest effect on outcomes. Finally, the Chapter discusses the effect pursuing some of the most favored policies to reduce risk would have on the ability of the ICC to accomplish its fundamental mission of bringing to justice those who commit the world's worst crimes.

II. Outcome Measures and Data

This section discusses the form of the outcome measures and data the chapter presents, the particular measures on which that presentation concentrates, and the rationale underlying that concentration

A. Form and Characteristics of, and Reliance upon, the Results Data

As discussed in the previous section, the study calculated the percentage of possible three- and five-judge panels that have at least a 10 percent, 25 percent, 50 percent, 75 percent, and 90 percent chance of issuing a liberal ruling on each type of case for each scenario.

The study looked at four types of cases, the j-points of which equal 125, 625, 750, and 875. The spectrum from which these cases are drawn range from extremely conservative (0) to extremely liberal (1000).⁴⁹⁴ A case with a j-point equal to 125 presents strongly conservative issues such that it would be unlikely for any judge who is not extremely conservative to rule conservatively. A liberal ruling on this case represents the ICC taking a case it should and acting in a way that fulfills the court's purpose. The other j-points—625, 750, and 875—each represent different types of cases that present

⁴⁹⁴ Previous sections considered ideology generally and j-points specifically to fall on a scale from -1 to +1. The values were rescaled by adding 1 and multiplying by 500 to fit the scale referenced above.

liberal issues, for which a liberal ruling would progress the law. A liberal ruling on a case whose j-point is 625 is only slightly liberal and only slightly progresses the law. A liberal ruling on a case whose j-point is 750, is more strongly liberal and more extensively progresses the law. A liberal ruling on a case whose j-point is 875 is very liberal and greatly progresses the law.⁴⁹⁵ Recalling the discussion in Chapter Two, the ICC ruling to progress the law on collateral damage issues may constitute a case with a j-point of 625. The court ordering disclosure of classified information or ruling Article-98 agreements to be unenforceable with respect to non-official nationals (nationals of a state not oversees as part of their employment with the state) may constitute a cases with a j-point of 750. The ICC making depleted uranium or other types of weapons or methods of war illegal may constitute a case with a j-point somewhere between 750 and 875. The ICC acting as a global supreme appellate court (finding countries were not genuinely willing to prosecute based on the ICC's disagreement with a ruling of a state's court) or holding the U.S. military justice system is not independent for purposes of complementarity may constitute cases with a j-point of 875.

As mentioned in Chapter Seven, five different cut points of probabilities for four different types of cases results in 20 output measures for each state of the world for each panel size (three- and five-judge panels) and slate of judges (all possible panels for the slate of judges in every time period and the panels only from the slate of judges in time periods t+4 through t+6). An example of the results for three-judge panels comprised from the slates of judges in time periods t+3 through t+6 (hereinafter referred to as the last three time periods) for the scenario in which all input variables retain their status quo value is displayed numerically in Table 8.1 and graphically in Figure 8.1. The table shows the percentage of all possible three-judge panels that rule liberally with the probability given by the cut point on a particular kind of case, as displayed by the j-point in each row. Thus, 95.8 percent of the possible three-judge panels have at least a 10

⁴⁹⁵ Some may take issue with equating the liberalness of rulings with expanding beyond the current law and argue that conservative rulings (or those that emerge from conservative legal philosophies) are equally likely to make new law. Without entering into that debate, the current construct is justified because the concern here is with the Court progressing the law to enact more restrictive rules regarding the law of armed conflict, which is more attune with liberal than conservative ideology.

percent chance of issuing a liberal ruling on a case with a j-point of 625, and a 46.5 percent of the panels have at least a 50 percent chance.

Table 8.1:
Percentage of Panels with the Given Probability of Issuing a Liberal Ruling
(Three-Judge Panels)

| j-point | Cut points (minimum probability of a liberal ruling) | | | | |
|---------|---|------|------|------|------|
| | 10 | 25 | 50 | 75 | 90 |
| 125 | 100 | 100 | 100 | 97.5 | 87.2 |
| 625 | 95.8 | 84.5 | 46.5 | 7.8 | 0.1 |
| 750 | 87.3 | 59.8 | 14.8 | 0.3 | 0 |
| 875 | 52.2 | 12 | 0.1 | 0 | 0 |

Figure 8.1 displays this information graphically. Each color represents a particular type of case, as indicated by the j-point in the legend. The cut points are on the horizontal axis. The vertical axis measures the percentage of panels that have at least the probability indicated on the horizontal axis of issuing a liberal ruling. On liberal cases, even those not involving the United States, a liberal ruling indicates that the court progresses the law, which generally would be unfavorable to the United States. This would be especially true for cases that involve a U.S. national. This example is presented because every combination of inputs produces output measures that follow the pattern the graph indicates. As case j-points increase, which indicate the extent of the liberalness of a liberal ruling, the percentage of panels that have a given probability of issuing a liberal ruling decreases. For any given probability level (cut point), fewer panels issue a liberal ruling as the liberalness of a case (j-point) increases. Similarly, the percentage of panels that issue a liberal ruling decreases at higher probability levels (cut points). That is, for any given type of case, fewer panels have at least a 50 percent chance of issuing a liberal ruling than have at least a 25 percent chance of issuing a liberal ruling.

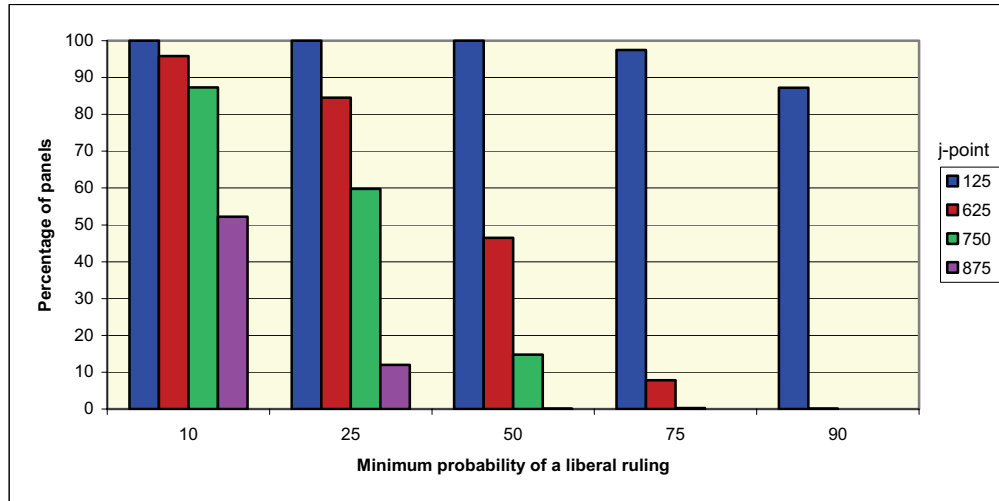


Figure 8.1:
Percentage of Panels with the Given Probability of Issuing a Liberal Ruling
(Three-Judge Panels)

The combinations of output measures allow different conceptions of the risk of a particular type of ruling the United States may face. Specifically, for each case, one can view the percentage of panels that have as little as a ten percent chance or greater of issuing a liberal ruling, the percentage of panels that have at least a one in four chance, the percentage of panels for which the probability is at least a coin flip, the percentage of panels that have at least a three in four chance, and the percentage of panels for which the decision approaches certainty.

These results, though, should not be interpreted literally. As discussed in Chapter Seven, this is an exercise in exploratory analysis and the lack of a veridical model makes the results themselves suspect. For example, it may be unwise to believe that 59.8 percent of all possible three-judge panels comprised from the last three time periods have at least a one in four chance of issuing a liberal ruling. More confidence, however, can be placed how combinations of inputs cause different changes in the outputs. In other words, one may rely more greatly on the relative changes in the output measures if not the output measures themselves.

For example, one can compare the percentages displayed in the status quo situation (which includes the United States not attempting to influence the nomination or voting process) with those that would result if the United States attempted to influence whether a country nominates a judge to the ICC and the type of judge the country

nominates (hereinafter referred to as the nominee and nomination policy), with all other inputs remaining the same. The results are displayed in Figures 8.2 and 8.3.

Figure 8.2 contains two bars for each cut point and j-point. The solid colored bars replicate the corresponding bars from Figure 8.1. They show the percentage of panels that rule liberally with a probability equal or greater to that indicated by the cut point on the horizontal axis.

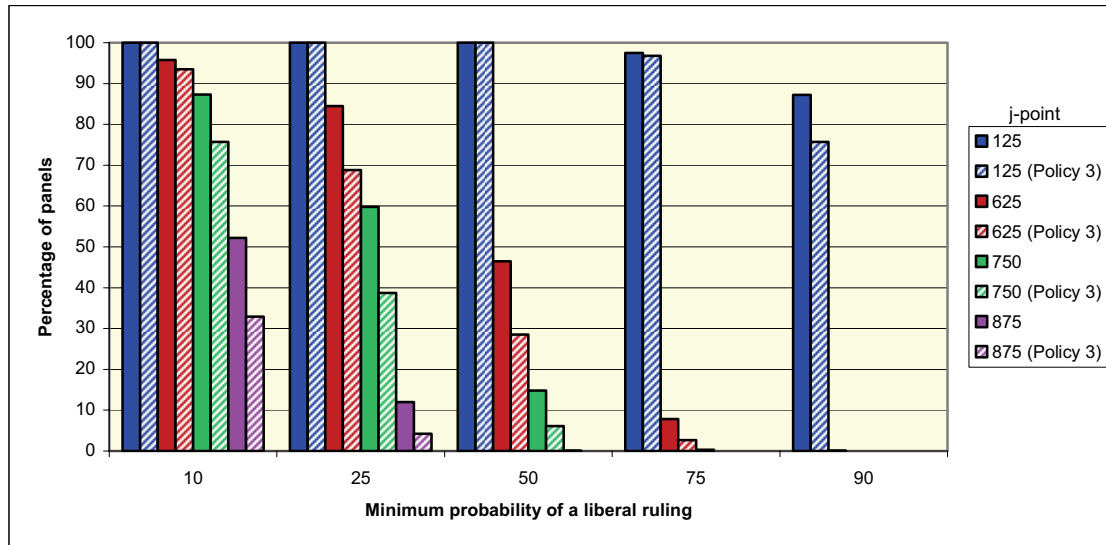


Figure 8.2:
Percentage of Panels with the Given Probability of Issuing a Liberal Ruling
for the Nominee and Nomination Policy versus the Status Quo
(Three-Judge Panels)

The striped bars next to the solid bars indicate the corresponding measure with the nominee and nomination policy implemented. The difference between each solid bar and its adjoining striped bar indicates the reduction in the percentage of panels that have the indicated probability of issuing a liberal ruling that results from the policy. These differences are graphed in Figure 8.3.

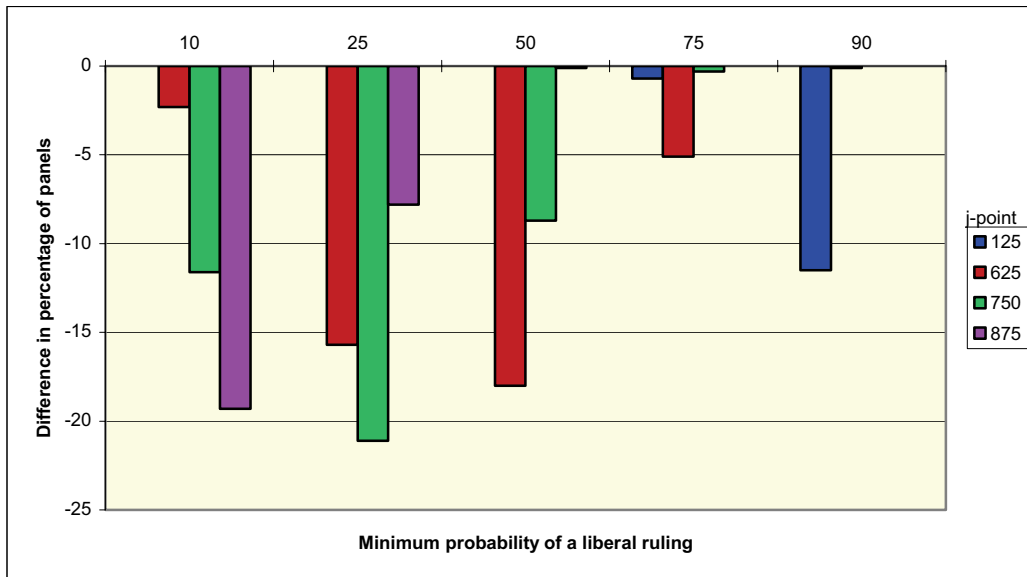


Figure 8.3:
Difference in the Percentage of Panels with the Given Probability of Issuing a Liberal Ruling Between the Nominee and Nomination Policy and the Status Quo

1. General Patterns of Results

As mentioned, the patterns that Figures 8.1, 8.2, and 8.3 display are representative of the results across a range of situations. This is evidenced in Figures presented in Appendix D that depict the percentage of panels with the given probability of issuing a liberal ruling averaged across every combination of every input (with the exception of the policy implemented, which will be discussed separately). The Figures in Appendix D correspond, and look almost identical, to Figures 8.1 through 8.3.⁴⁹⁶ The heights of the bars differ slightly but the patterns of their relative size do not.

More specifically, on the conservative case (j-point equals 125), for virtually every combination of inputs (every scenario the model considers), every panel tends to have at least a 25 percent chance of issuing a liberal ruling. Conversely, for the most liberal case (j-point equals 875), for virtually every combination of inputs (every scenario

⁴⁹⁶ Figure D8.1 displays the average percentage of panels ruling liberally with at least the probability given by the cut point for all combinations of inputs when the United States does not attempt to influence the process. Figure D8.2 displays the same and compares them to similar results for when the United States employs the nominee and nomination strategy. Figure D8.3 shows the difference in percentages due to the policy.

the model considers), no panel tends to have at least a 75 percent chance of issuing a liberal ruling.

The pattern of reductions Figure 8.3 displays also is generally followed across different variations of inputs. More specifically, the size of the changes in outputs for different combinations of cut points and j-points vary greatly. Across cases, there will be little if any change when having the given probability of issuing a liberal ruling is a near certainty (almost every panel issues one) or a near impossibility (few panels issue one). This is because when having the given probability of issuing a liberal ruling is extremely likely or extremely unlikely, it is not sensitive to changes in the inputs that result in a different scenario. For example, across liberal cases, there is little change at the 90 percent cut point because it is very difficult to reach a 90 percent probability of issuing a liberal ruling. Note that this is not true for the conservative case (j-point = 125) for which reaching any of the given levels of probability of issuing a liberal ruling, including the 90 percent probability, is relatively easy.⁴⁹⁷

What occurs at the 90 percent cut point also occurs at the 75 percent cut point, albeit to a lesser extent. The rationale is similar: just as achieving a 90 percent probability is difficult, so too is it difficult to achieve a 75 percent probability, especially for the more liberal cases. Conversely, the ten percent cut point is very easy to achieve for the conservative case and the most moderate of the liberal cases (j-point = 625), which makes it difficult for the policy to have any effect for these cases at this cut point. Figure 8.3 confirms this lack of effect. The change due to the policy (or more generally, any change in input) for the most liberal cases is greatest in the lower cut points and nonexistent in the highest cut points (the probabilities that are difficult to reach). The exception is that there is little change in the more moderately-liberal cases (j-point = 625 and 750) at the ten percent cut point, because of the ease of achieving this probability.

⁴⁹⁷ This suggests that the various U.S. policies tested here will have little impact on the court's ability to fulfill its stated purpose, bringing to justice those who commit the world's most egregious crimes. This topic will be discussed more thoroughly later in this Chapter.

2. Differences

These and other types of differences in outputs that results from changes in inputs are a key measure that this study assesses. In searching across variations in inputs for the effect on output, the 20 output measures (one measure for every interaction of each j-point and cut point), which Figure 8.3 display, are averaged (dropping those for which there is no change). This tends to understate the effect of a change in an input or policy. For example, the average reduction in the percentage of panels issuing a liberal ruling displayed in Figure 8.3 is 8.7. This seems quite small if not trivial, which belies the true effect of this policy in this situation. Two of the outcomes measures reveal a reduction of 19 percentage points in the percentage of panels with the given probability of issuing a liberal ruling. For another two, the reduction exceeds 15 percentage points, and for another two the reduction exceeds ten. Although the average tends to understate the effect, it does so uniformly across situations. Thus, it does not affect an assessment as to which variations of which inputs cause greater or lesser change. It only understates the extent of that change.

3. Best Policy and Regret

The study also calculated the best policy and a measure of regret for every case (or outcome). The best policy (when discussing the liberal cases) is the one that returns the fewest percentage of panels that have the probability given by the cut point of issuing a liberal ruling. Regret is the difference between the percentage of panels that rule liberally with the probability given by the cut point in the given situation versus the lowest percentage of panels ruling liberally that could have been achieved through the best policy.⁴⁹⁸

As an example, consider Table 8.2 which displays results for the status quo state of the world (none of the inputs change) for a j-point equal to 625 and looking only at 3-judge panels. There are five categories of cases, one for each cut point. Within the category belonging to the cut point equal to 25, policy five produces the lowest

⁴⁹⁸ LEMPert, ET AL., *supra* note 421, at 55 (citing LEONARD J. SAVAGE, THE FOUNDATIONS OF STATISTICS (1950)).

percentage of panels that have at least a 25 percent chance of issuing a liberal ruling (48.2 percent of panels). Thus, policy five is the best policy and 48.2 percent is the reference percentage for the calculations of regret within this category of cases. For example, policy six produces 48.3 percent of panels with at least a 25 percent chance of issuing a liberal ruling. Thus, policy six has a regret of 0.1 (48.3 – 48.2). In contrast, policy 1 (the status quo) produces 84.5 percent of panels with at least a 25 percent chance of issuing a liberal ruling. Thus, policy 1 has a regret of 36.3 (84.5 – 48.2). For a different category of cases, like that in which the cut point equals 50, there could be a different best policy and reference percentage for the calculation of regret.⁴⁹⁹

Table 8.2:
Regret for Status Quo Cases with a J-point Equal to 625
(Three-Judge Panels)

| j-point | Cut point | Policy | Best Policy | Percent of Panels | Regret |
|---------|-----------|--------|-------------|-------------------|--------|
| 625 | 10 | 1 | 5 | 95.8 | 8.5 |
| 625 | 10 | 2 | 5 | 90.6 | 3.3 |
| 625 | 10 | 3 | 5 | 93.5 | 6.2 |
| 625 | 10 | 4 | 5 | 96.0 | 8.7 |
| 625 | 10 | 5 | 5 | 87.3 | 0.0 |
| 625 | 10 | 6 | 5 | 87.9 | 0.6 |
| 625 | 25 | 1 | 5 | 84.5 | 36.3 |
| 625 | 25 | 2 | 5 | 57.3 | 9.1 |
| 625 | 25 | 3 | 5 | 68.8 | 20.6 |
| 625 | 25 | 4 | 5 | 83.0 | 34.8 |
| 625 | 25 | 5 | 5 | 48.2 | 0.0 |
| 625 | 25 | 6 | 5 | 48.3 | 0.1 |
| 625 | 50 | 1 | 6 | 46.5 | 34.7 |
| 625 | 50 | 2 | 6 | 18.4 | 6.6 |
| 625 | 50 | 3 | 6 | 28.5 | 16.7 |
| 625 | 50 | 4 | 6 | 30.7 | 18.9 |
| 625 | 50 | 5 | 6 | 13.7 | 1.9 |
| 625 | 50 | 6 | 6 | 11.8 | 0.0 |
| 625 | 75 | 1 | 6 | 7.8 | 7.2 |
| 625 | 75 | 2 | 6 | 1.4 | 0.8 |
| 625 | 75 | 3 | 6 | 2.7 | 2.1 |
| 625 | 75 | 4 | 6 | 3.3 | 2.7 |
| 625 | 75 | 5 | 6 | 1.3 | 0.7 |
| 625 | 75 | 6 | 6 | 0.6 | 0.0 |
| 625 | 90 | 1 | NA | 0.0 | NA |
| 625 | 90 | 2 | NA | 0.0 | NA |
| 625 | 90 | 3 | NA | 0.0 | NA |
| 625 | 90 | 4 | NA | 0.0 | NA |
| 625 | 90 | 5 | NA | 0.0 | NA |
| 625 | 90 | 6 | NA | 0.0 | NA |

⁴⁹⁹ Lower regret indicates less cost for having chosen a policy that is not the best.

B. Concentration

The figures and graphs presented in this Chapter are limited to those from three-judge panels derived from the slates of judges from the last three time periods. As discussed previously, the simulation produced over 40 million results. Although analysis was conducted across the entire sample space, for the sake of brevity, the results presented are limited to three-judge panels derived from the slates of judges from the last three time periods.

1. Three-Judge Panels

Three-judge panels were chosen instead of five-judge panels because all important cases are initially heard by three-judge panels. For any case involving the United States, the initial ruling is critical due to its practical and political consequences. The ruling may set forth obligations of allies, such as having to surrender a U.S. national or making available witnesses and other evidence, including classified information. Any ruling not involving the United States may nonetheless affect the United States if it sets forth new law, and thus new obligations, that would increase the risk to the United States should it choose not to follow those new obligations. Whether those new obligations are upheld would be determined by a five-judge panel of the Appeals Chamber should an appeal go forth, and there is no guarantee that one would. In addition, even assuming an appeal is (1) undertaken, and (2) successful, the increased risk exists until the original ruling is overturned. In any event, the results from the three-judge panels were consistent with those from the five-judge panels with some systematic variations displayed in Table 8.3 and Figure 8.4. Panel (a) of Table 8.3 shows the average percentage of three-judge panels spanning all scenarios that rule liberally with the given probability. Panel (b) shows the same for five-judge panels. Panel c shows the difference between these percentages, and Figure 8.4 graphs these differences.

The table and figure reveal that three-judge panels are more likely to rule in a manner unfavorable to the United States' goals than were the five-judge panels. For the conservative case (j-point = 125), a fewer percentage of three-judge than five-judge panels rule in a liberal manner. A liberal ruling on the conservative case captures the court doing what it should, the enablement of which is one of the United States' goals

regarding the ICC. On the liberal cases (j-point = 625, 750, 875), a greater percentage of three-judge than five-judge panels have the given probability of issuing a liberal ruling. A liberal ruling on these cases captures the court progressing the law or otherwise ruling in a manner unfavorable to the United States.

Table 8.3:
Differences Between the Percentage of Three- and Five-Judge Panels
with the Given Probability of Issuing a Liberal Ruling

| | | Cut points (minimum probability of a liberal ruling) | | | | | |
|---|--|---|-------|-------|------|------|-------|
| | | j-point | 10 | 25 | 50 | 75 | 90 |
| (a) 3-judge | | 125 | 100.0 | 100.0 | 99.4 | 92.3 | 71.4 |
| | | 625 | 89.3 | 66.2 | 31.3 | 5.8 | 0.1 |
| | | 750 | 72.2 | 40.7 | 10.2 | 0.4 | 0.0 |
| | | 875 | 35.8 | 8.4 | 0.1 | 0.0 | 0.0 |
| | | | | | | | |
| | | j-point | 10 | 25 | 50 | 75 | 90 |
| (b) 5-judge | | 125 | 100.0 | 100.0 | 99.8 | 97.0 | 85.3 |
| | | 625 | 85.6 | 61.4 | 28.5 | 5.0 | 0.2 |
| | | 750 | 61.8 | 30.8 | 5.8 | 0.1 | 0.0 |
| | | 875 | 17.9 | 1.8 | 0.0 | 0.0 | 0.0 |
| | | | | | | | |
| | | j-point | 10 | 25 | 50 | 75 | 90 |
| (c) Difference: 3-judge minus 5-judge | | 125 | 0.0 | 0.0 | -0.4 | -4.7 | -13.8 |
| | | 625 | 3.7 | 4.8 | 2.9 | 0.8 | 0.0 |
| | | 750 | 10.4 | 9.9 | 4.5 | 0.2 | 0.0 |
| | | 875 | 18.0 | 6.6 | 0.1 | 0.0 | 0.0 |
| | | | | | | | |

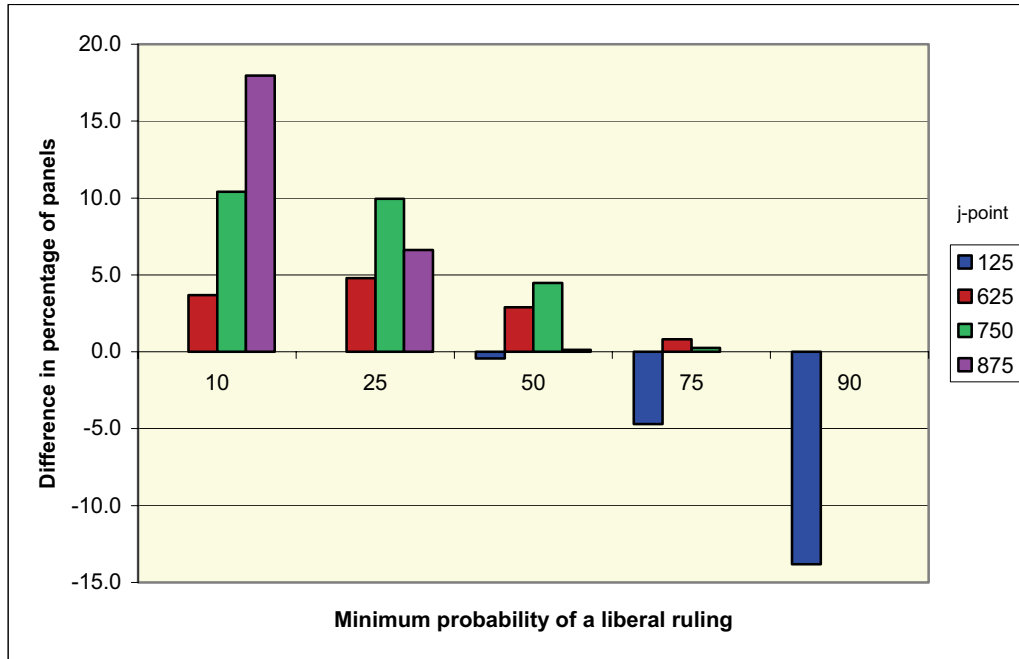


Figure 8.4:
Differences Between the Percentage of Three- and Five-Judge Panels
with the Given Probability of Issuing a Liberal Ruling

The pattern the averages display existed across the range of cases. Table 8.4 shows the percentage of cases (or situations) in which the percentage of three-judge panels with the given probability of issuing a liberal ruling was less than, equal to, and greater than the percentage of five-judge panels. For the conservative case, in every situation, the percentage of three-judge panels with the given probability of issuing a liberal ruling was less than or equal to the percentage of five-judge panels. For the liberal cases, in almost every situation, the percentage of three-judge panels with the given probability of issuing a liberal ruling was greater than or equal to the percentage of five-judge panels. This suggests that the three-judge panels are more likely to rule in a manner unfavorable to the United States than are the five-judge panels. Because the Pre-Trial and Trial Chambers rule in three-judge panels and the Appeals Chamber rules in five-judge panels, this suggests that initial rulings are more likely to be unfavorable to the United States than rulings on appeals.

Table 8.4:
Categories of Differences Between the Percentage of Three- and Five-Judge Panels with a Given Probability of Issuing a Liberal Ruling

| j-point | Direction of Difference | | |
|---------|-------------------------|---------------|---------------|
| | 3-jdg < 5-jdg | 3-jdg = 5-jdg | 3-jdg > 5-jdg |
| 125 | 45.74 | 54.26 | 0.00 |
| 625 | 5.90 | 14.07 | 80.03 |
| 750 | 0.06 | 29.26 | 70.68 |
| 875 | 0.00 | 53.79 | 46.21 |

Of note is that the differences between the percentage of three- and five-judge panels is generally small, except deep in the tails of the distributions. Figure 8.5, which shows histograms of the differences between the percentage of three- and five-judge panels that rule liberally with the probability given by the cut point for each j-point, and Table 8.5, which shows those differences at various percentiles, illustrate the size of the differences, specifically, the mass of cases in which the difference is at or close to zero.

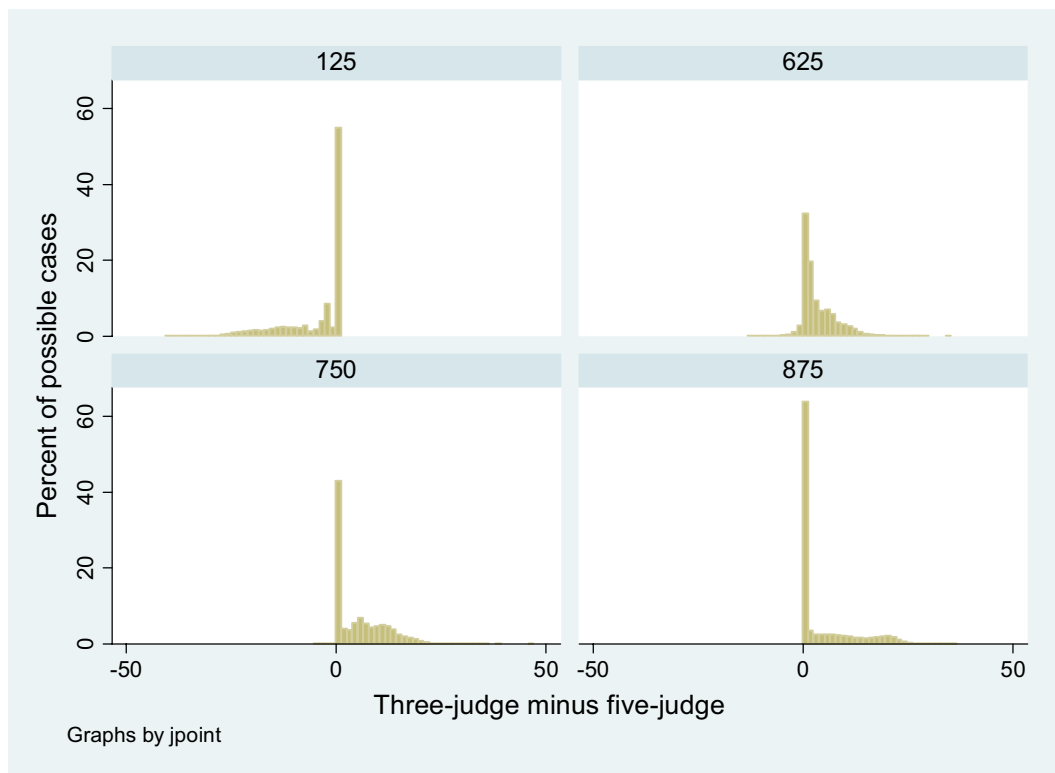


Figure 8.5:
Histograms of Differences Between the Percentage of Three- and Five-Judge Panels with a Given Probability of Issuing a Liberal Ruling

Table 8.5:
Percentiles of Differences Between the Percentage of Three- and Five-Judge Panels with a Given Probability of Issuing a Liberal Ruling

| j-point | Percentiles (three-judge minus five-judge) | | | | | | | | | |
|---------|--|-------|-------|------|-----|-----|------|------|------|------|
| | 1% | 5% | 10% | 25% | 50% | 75% | 90% | 95% | 99% | Avg. |
| 125 | -25.6 | -20.9 | -16.5 | -7.7 | 0.0 | 0.0 | 0.0 | 0.0 | 0.0 | -4.6 |
| 625 | -2.5 | -0.1 | 0.0 | 0.2 | 1.9 | 5.6 | 9.4 | 11.6 | 16.0 | 3.4 |
| 750 | 0.0 | 0.0 | 0.0 | 0.0 | 3.6 | 9.7 | 13.9 | 16.7 | 20.4 | 5.3 |
| 875 | 0.0 | 0.0 | 0.0 | 0.0 | 0.0 | 6.5 | 16.9 | 20.2 | 23.6 | 4.2 |

2. Slates of Judges from the Last Three Time Periods

The panels derived from the slates of judges from the last three time periods were chosen so that the full effect of the changes in variables and whichever policies are attempted could be viewed. Recall that there are currently 18 judges on the court. Not until time period $t+3$ will all of those judges be replaced by judges elected to the bench pursuant to the various strategies the United States attempts. Results from all time periods were consistent with those from only the last three time periods, but showed a lessened effect of each policy, which is likely due to the presence of judges who were on the bench before the policy was implemented.

3. Liberal versus Conservative Cases

Finally, the results reported throughout most of this chapter exclude the effect on the conservative case. That is, when calculating the average regret or average difference of issuing a liberal ruling across policies, the conservative case is excluded. The purpose of the policies is to reduce the risk that comes from issuing a liberal ruling on liberal cases. Including the conservative case in calculating the averages would be to include an irrelevant factor that may skew the results. The effect on the conservative case is analyzed separately.

III. The Effects of the Policies

A. Comparing Policies

Three criteria were used to compare the policies across the outcome measures:⁵⁰⁰

- The average percent of panels that issue a liberal ruling with the probability given by the cut point,
- In each of the 40 million cases, how often a particular policy was best in that it returned the fewest percentage of panels that issue a liberal ruling with the probability given by the cut point, and
- The average regret.

The figures below refer to policies by number. The policies and their numbers are as follows:

- Policy one: Status quo
- Policy two: Influence what type of judge a country nominates
- Policy three: Influence what type of judge a country nominates and whether a country nominates a judge
- Policy four: Influence for which nominees a country votes
- Policy five: The combination of policy two and four: influence what type of judge a country nominates and for which nominees a country votes
- Policy six: The combination of all policies (influence what type of judge a country nominates, whether a country nominates a judge, and for which nominees a country votes)

Figure 8.6 displays a histogram of the percentage of cases in which each policy was best across all the situations for the three liberal j-points, three-judge panels, and the slates of judges covering the last three time periods. The figure excludes cases in which no policy performed better than any other policy (every policy produced the same result), which occurred in 24.63 percent of cases.⁵⁰¹ Thus, the percentages in Figure 8.6 are

⁵⁰⁰ These measures were described, and examples of each were provided, earlier in the section entitled, “Best Policy and Regret.”

⁵⁰¹ This occurs when no policy has any effect in altering the percentage of panels ruling liberally with the probability given by the cut point.

conditional percentages (conditional on at least one policy being better than another). Figure D8.6 in Appendix D shows a similar histogram graphing the unconditional percentages, which includes those cases in which no policy performs better than another. The table under the graph in Figure 8.6 shows the elements of each policy: whether the policy involves influencing the type of nominee a country nominates, whether a country nominates a judge, for whom a country votes, or some combination of the three.

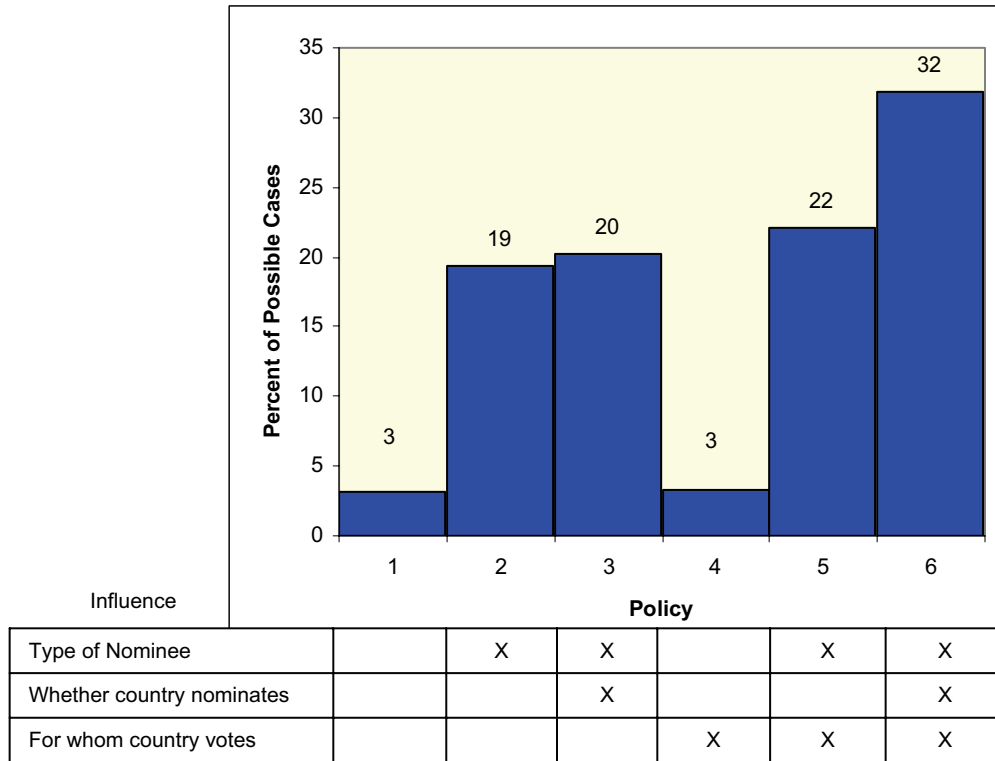


Figure 8.6:
Percent of All Possible Cases in which Each Policy is Best

This first cut at analyzing the results suggests that policy six, which envisions influencing every aspect of the judicial nomination and selection process, would be best. Policies five, three, and two follow in that order but are all sufficiently similar to each other in the frequency with which they are best to suggest that none may be truly better than any other.

Of note is the poor performance of policy four, which envisions influencing only the voting process but not the nomination process. Policy four may perform poorly because even if the United States successfully influences countries to vote for more conservative nominees, there are too few conservative nominees for this policy to have any impact. Indeed, the policy may be counterproductive in that it may draw votes away from more moderate nominees who would have been elected to the few conservative nominees who have little chance of being elected. This causes more liberal nominees to be elected instead of the more moderate nominees that would have been elected had the United States not influenced countries to vote more conservatively. There is some

empirical support for this hypothesis in that policy four performs slightly worse than policy one across a wide range of inputs.

As mentioned, viewing the percentage of instances in which a policy performs best is only a first cut at the analysis, and one that often can be deceiving. Figure 8.7 displays two other measures for each policy: the average percentage of panels across all cases that rule liberally with the probability given by the case's cut point and the average regret. For both these measures, a smaller number is preferred.⁵⁰²

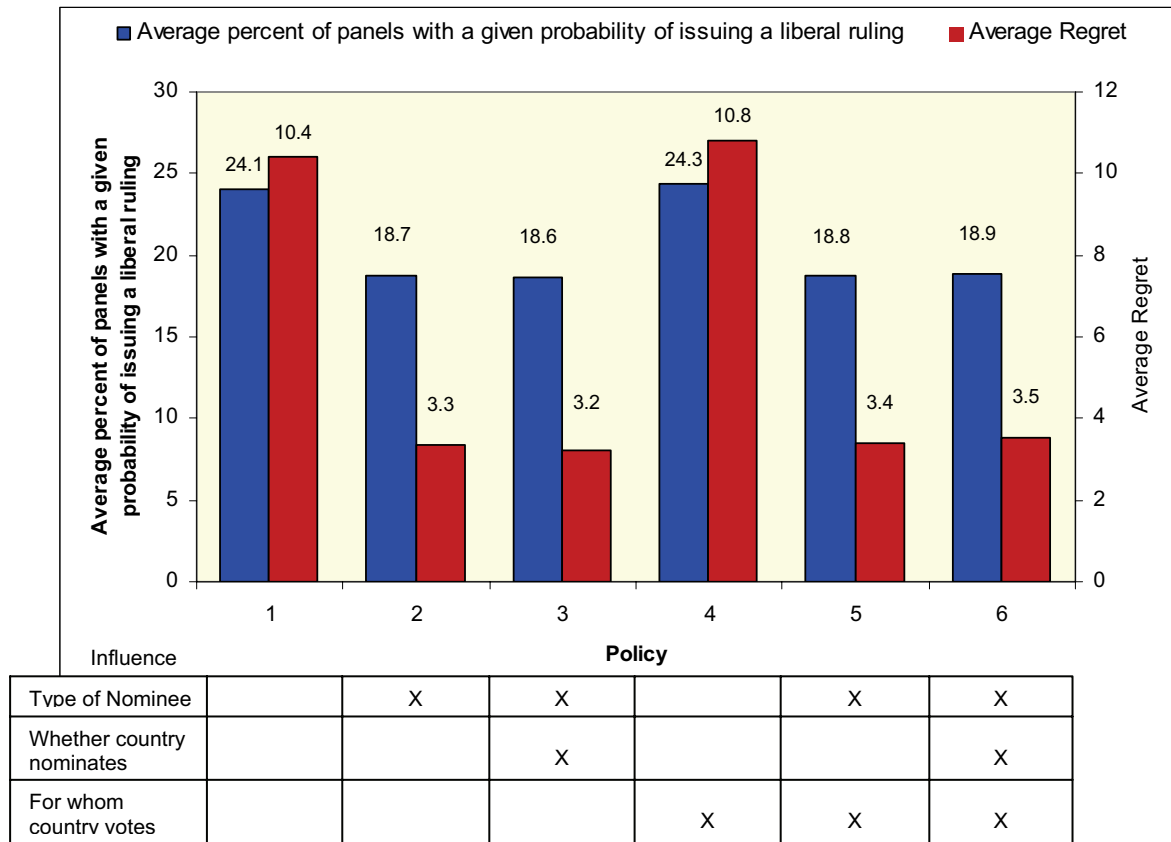


Figure 8.7:
Average Percent of Panels with a Given Probability of Issuing a Liberal Ruling and Average Regret for Each Policy

According to Figure 8.7, policy three is very slightly superior but policies two, three, five, and six are all virtually indistinguishable from one another both in terms of

⁵⁰² For a description and example of these measures, see *supra* section entitled, “Best Policy and Regret.”

the average percentage of panels that issue a liberal ruling and the regret that occurs from selecting that policy.

Interesting is that policy six is best in the most cases by a wide margin, as shown in Figure 8.6, but policies two and three have slightly less average regret as shown in Figure 8.7. This suggests that whereas policy six has more instances in which it is the best policy, it does markedly worse when it is not best. Conversely, policies two and three are best less often but have less average regret, suggesting that those policies are more robust.

To examine the robustness of the above results, and specifically to examine how different states of the world affect these results, the average percentage of panels that issue a liberal ruling and the average regret were assessed across the range of values for every input variable including interactions of different values for different variables.

The patterns displayed in Figure 8.7 are consistent across the range of values representing changes in countries ideal points and the importance with which they view the issue of the court's reach and role, U.S. power, and U.S. amiability with other nations.

The patterns are mostly consistent across changes in the types of countries that join the ICC. The exception is that policy two becomes very slightly superior, albeit still quite close to the performance of policy three, under the scenario in which ten countries with conservative views and no neutral countries join the court.⁵⁰³ In addition, policies two and three are more clearly preferable to policies five and six under this scenario. These outcomes are depicted in Figure 8.8. This scenario—ten countries with conservative views and no neutral countries join the court—is plausible albeit somewhat unlikely. More probable are the scenarios in which either (1) ten neutral countries, or (2) ten neutral countries and ten conservative countries join the court.⁵⁰⁴ In these, policy

⁵⁰³ Policy two was also slightly superior under the scenario in which ten countries with neutral views and 30 countries with conservative views join the court. This scenario seems unrealistic but was chosen to bound the space. Telling is that even with those extreme changes in ICC membership, the results differ only slightly.

⁵⁰⁴ The scenario in which ten countries with conservative views but no countries with neutral views join the court seems less likely than the other referenced scenarios because the conservative countries are more opposed to the court than the neutral countries. Thus, it seems that whatever phenomenon is causing conservative countries to join the court would also cause neutral countries to join as well.

three remained slightly superior and almost indistinguishable from policies two, five, and six.

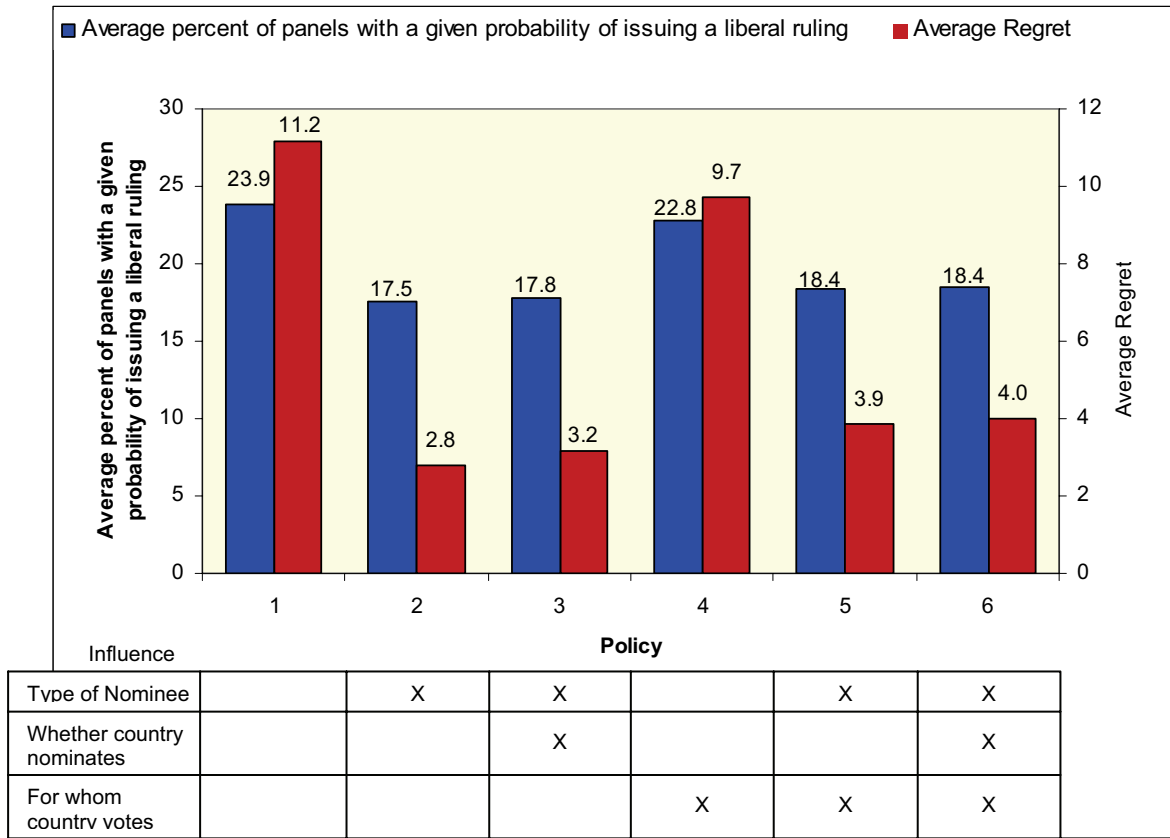


Figure 8.8:
Average Percent of Panels with a Given Probability of Issuing a Liberal Ruling and Average Regret for Each Policy When Ten Conservative and Zero Neutral Countries Join the ICC

The patterns in Figure 8.7 also were generally consistent across changes in whether like-minded and opposing powers influence the process and the extent of power that they have, but there were some aberrations. First, when the opposing powers attempt to influence the process but like-minded powers do not, policies two and three performed markedly better than policies five and six. Within this situation (opposing powers attempt to influence the process but like-minded powers do not), there are three specific scenarios: the extent of power stays the same, increases, or decreases. When power remained the same, the effect of policies two and three remained very close to each other. When power increased, policy three performed better than policy two, and when power decreased, policy two performed better than policy three. Figure 8.9 illustrates this. On

the horizontal axis of Figure 8.9 are policies two, three, and six for each of the different directions of power (constant, increase, and decrease).⁵⁰⁵ As discussed earlier, the differences and the raw numbers appear small, but because they average across some very large and many very small amounts, their size belie their effect.⁵⁰⁶

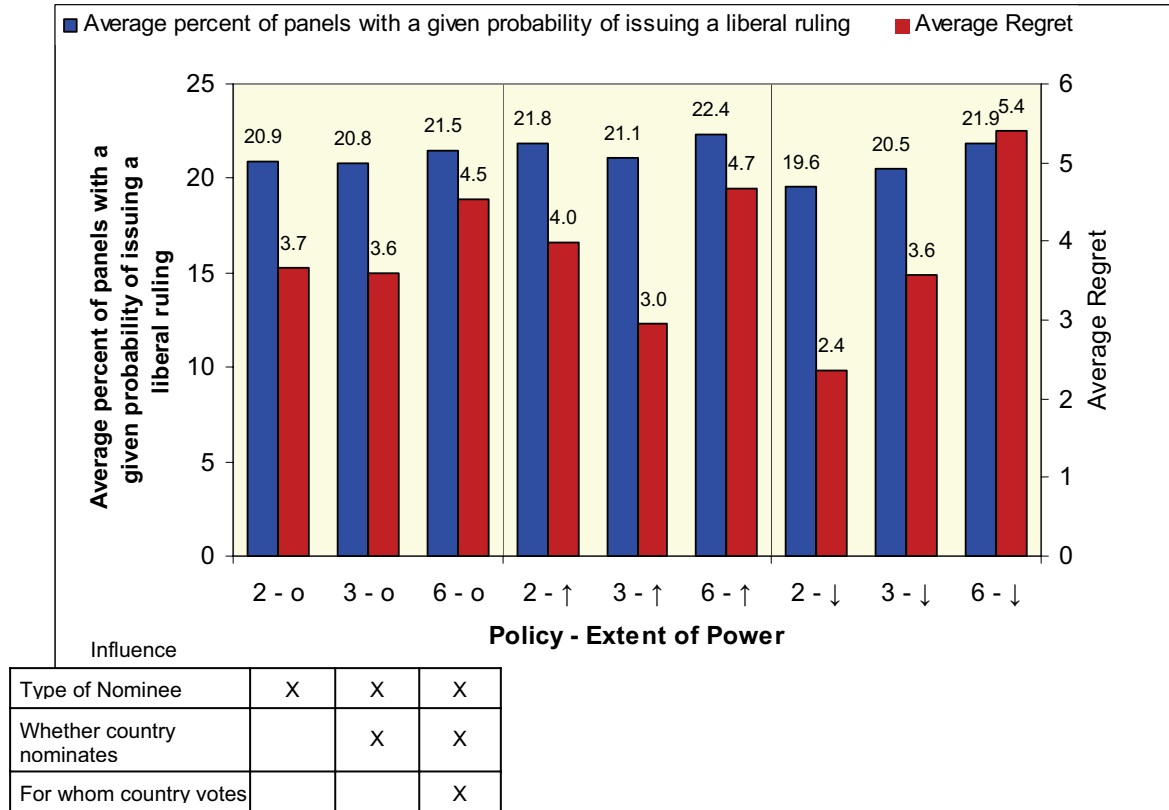


Figure 8.9:
Average Percent of Panels with a Given Probability of Issuing
a Liberal Ruling and Average Regret for Policies Two, Three, and Six When
Opposing Powers but not Like-Minded Powers Exert Influence

These scenarios—opposing powers attempt to influence the process but like-minded powers do not—are noteworthy because they seem most probable. The like-minded nations—the United Kingdom, China, and Russia—may not engage in this process as Russia and China may be content to remain distanced from the court and the policy of the United Kingdom is difficult to predict. The United Kingdom has strongly

⁵⁰⁵ Constant power is indicated by “o.” Increased power is indicated by an up arrow. Decreased power is indicated by a down arrow.

⁵⁰⁶ See *supra* section entitled “Differences.”

supported the court, but, with an actively engaged military, an ICC willing to progress the law poses risks to it. In addition, as evidenced by their aggressive opposition to the Article-98 agreements, France and Germany have proven their willingness to influence other nations' ICC actions. Thus, the scenarios that envision like-minded powers not attempting to influence other nations while opposing nations engage in the process seem most likely.

The only scenarios in which policy six performed markedly better than policies two or three were those in which like-minded powers engage in the process but opposing powers do not. For the reasons discussed above, these scenarios seem unlikely.

B. Accounting for Blowback and the Probability of Cheating

The analysis above examined how changes in variables concerning states of the world affect the performance of the policies. It did not link the reactions of nations to those policies. This section examines which reactions are likely to be linked to which policies and illustrates how, under these assumptions, policies two and three perform markedly better than policy six.

Attempting to influence the nomination and election process is not costless. As discussed in previous sections, it may cause some discontent that can reduce the effectiveness of influence attempts. If blowback, which captures this reduction in effectiveness, is consistent across policies, the results discussed above apply. That is, if blowback is the same value (regardless of what that value is) no matter the policy selected, then the results above hold. But if the extent of blowback is linked to policies, the analysis changes. This section examines the effect when multiple influence attempts—attempting to influence nominations *and* votes (policies five and six)—causes blowback while single influence attempts (policies two, three, and four) do not cause blowback. Two values for blowback were examined, moderate and heavy. The below analysis reports results for only the moderate blowback case. In every instance the effect of heavy blowback exceeded that of moderate blowback but most often only negligibly. This is likely due to blowback having a diminishing marginal effect. Thus, the initial blowback has the greatest effect whereas additional blowback has a lesser effect.

This section also accounts for the probability of cheating. Because votes are secret but nominations are public, the United States may not know whether a nation succumbs to its influence in casting its votes. Thus, any influence that is a result of U.S. power, either from promises of benefit or threats of costs, may be ineffective without a way to measure compliance. Thus, this section factors in a probability of U.S. power being ineffective in the policies involving votes (policies four, five, and six).

These assumptions have a non-trivial effect. The histogram of best policies displayed in Figure 8.10 is markedly different from that discussed above and displayed in Figure 8.6.⁵⁰⁷ Policy three now performs best most often, followed by policy two. Policy six, which is best most often when blowback and the probability of cheating is not linked to the policy attempted, is now third.

⁵⁰⁷ As in Figure 8.6, these probabilities are conditional upon at least one of the policies having an effect. Figure D8.10 in Appendix D shows the histogram of the unconditional probabilities.

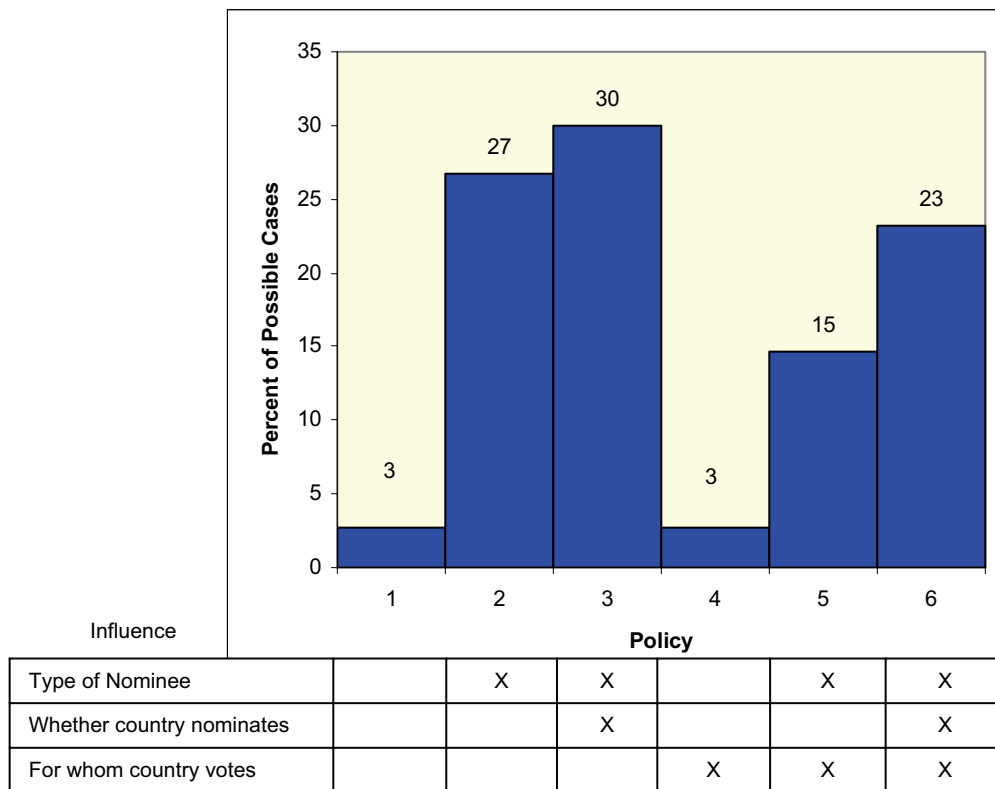


Figure 8.10:
Percent of All Possible Cases in which Each Policy is Best
Accounting for Blowback and the Probability of Cheating

Of greater concern than how often a policy performs best is how the policy performs across the range of scenarios. Figure 8.11, which corresponds to Figure 8.7 above, illustrates that policies two and three are perceptibly better than policies five and six in terms of having less average regret and fewer percent of panels with a probability equal to the given cut point.

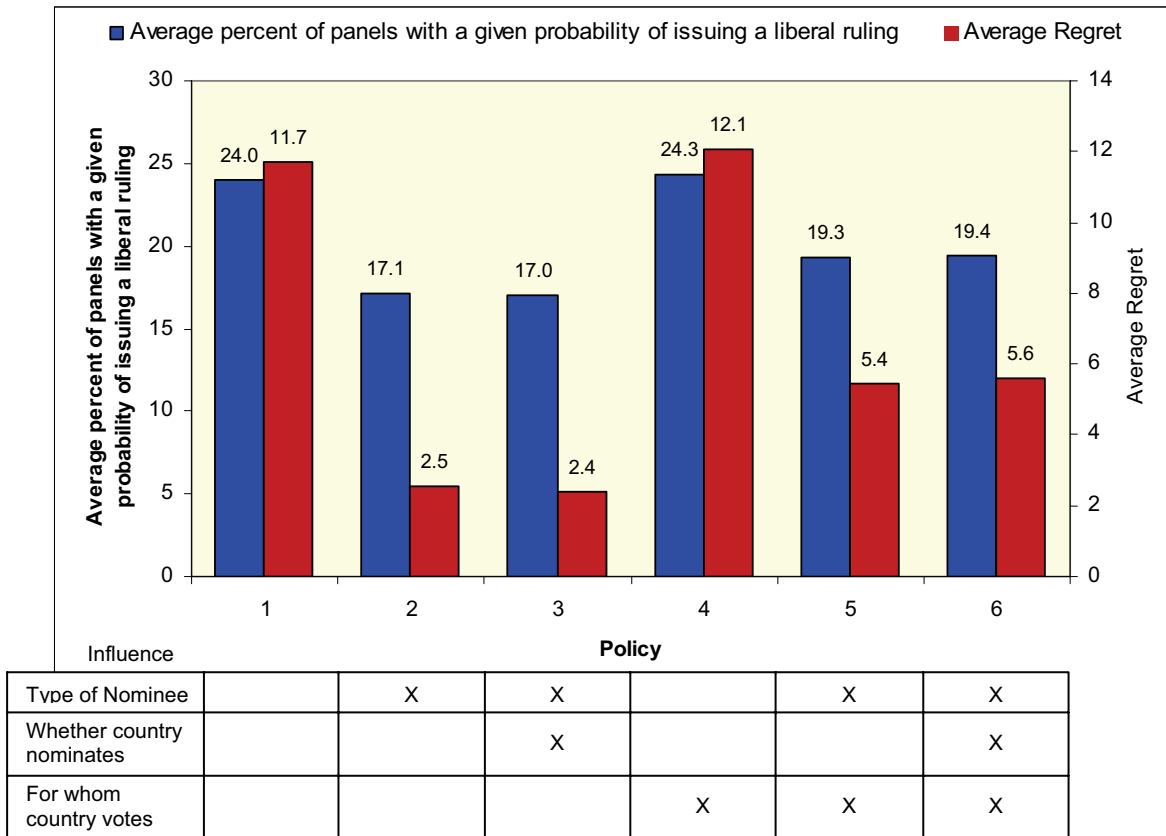


Figure 8.11:
Average Percent of Panels with a Given Probability of Issuing
a Liberal Ruling and Average Regret for Each Policy
Accounting for Blowback and the Probability of Cheating

Full examination of how these policies performed across the range of input variables was conducted here as well. The relative of policies two and three were very close to each other, just as they were above. The performance of policy six as compared with policies two and three changed dramatically. When linking blowback and the probability of cheating to the policies, policy six consistently performed worse than policies two and three.

To further dissect the relative performance of policies two, three, and six, histograms of the difference in the percentage of panels that issue a liberal ruling under each policy versus the other policy in every state of the world for every combination of cut point and j-point were created and are displayed in Figure 8.12. Each histogram graphs the distribution of the difference in the percentage of panels that rule liberally with the probability given by the observation's cut. The title of each is "Policy *i* Minus Policy

k ". The policy that performs better has a smaller percentage of panels that issue a liberal ruling. Thus, positive values indicate that policy k performs better than policy i (policy i has a greater percentage of panels that issue a liberal ruling) and negative values indicate that policy k performs worse than policy i (policy i has a lesser percentage of panels that issue a liberal ruling). For example, at the ninetieth percentile or Policy 3 Minus Policy 2, policy 3 has, on average, 4.5 percent more panels that rule liberally than does policy 2.

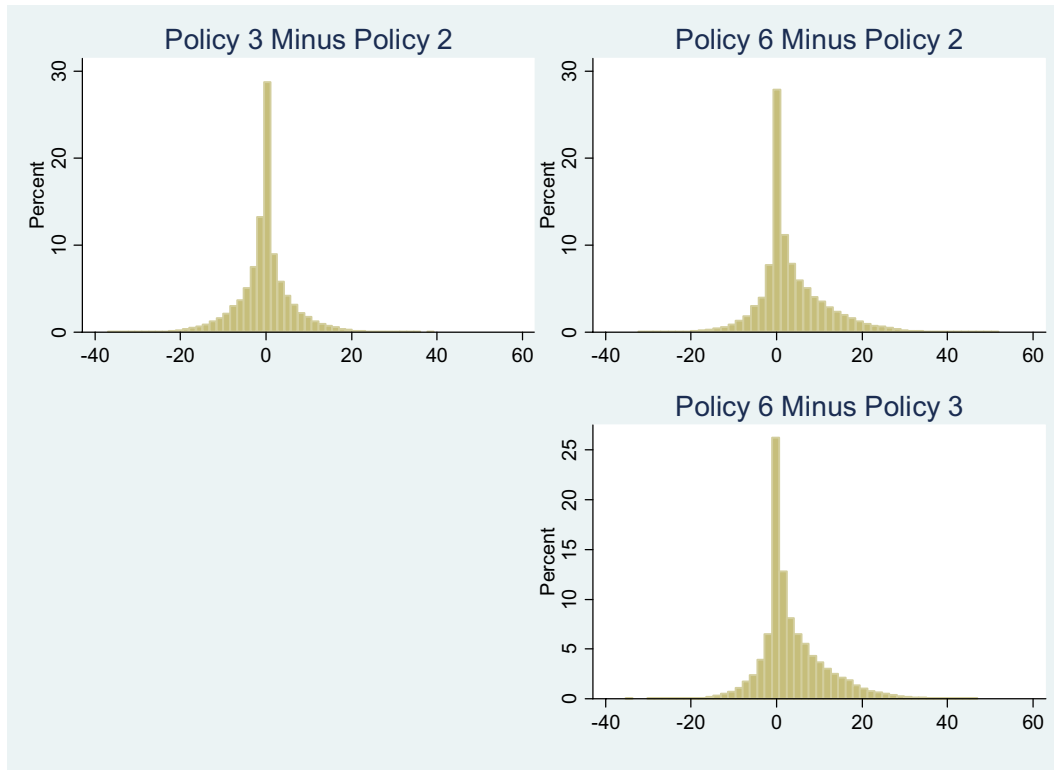


Figure 8.12:
Histograms of the Relative Performance of Policies Two, Three, and Six

The histograms tend to obscure some of the instances in which one policy performs markedly better than another. Table 8.6 displays the values of the variables at various percentiles. The Figure and Table reveal that policies two and three are very similar in the instances in and the extent by which one has a reduced probability of resulting in a liberal ruling than the other. In contrast, policies two and three outperform policy six more frequently and by a greater extent than policy six outperforms them. In 10 percent of the cases, policies two and three have at least 11 percent fewer panels that issue a liberal ruling whereas in only one percent of the cases does policy six similarly

outperform policies two and three. Moreover, in 5 percent of the cases, policies two and three outperform policy six by at least 16 percent of the panels and in 1 percent of the cases policies two and three outperform policy six by over 25 percent of the panels.

Table 8.6:
Percentiles of the Relative Performance of Policies Two, Three, and Six

| | 1% | 5% | 10% | 25% | 50% | 75% | 90% | 95% | 99% |
|-------------------------|-------|------|------|------|-----|-----|------|------|------|
| Policy 3 minus policy 2 | -16.2 | -8.6 | -5.0 | -0.6 | 0.0 | 0.4 | 4.5 | 8.1 | 16.1 |
| Policy 6 minus policy 2 | -12.0 | -4.9 | -1.9 | 0.0 | 0.0 | 3.3 | 11.0 | 16.1 | 25.9 |
| Policy 6 minus policy 3 | -10.9 | -4.4 | -1.6 | 0.0 | 0.0 | 3.5 | 11.0 | 16.1 | 25.7 |

These results tend to suggest that when multiple policies result in blowback and nations have some small probability of cheating on their votes, policies two and three perform similarly, with policy three slightly better than policy two, and both out perform policy six.

In addition, the above accounts for blowback which is one type of cost that may accompany policy six, but it does not account for other, harder to measure costs. Policy six, which is the kitchen-sink approach and entails attempting to influence what type of judges countries nominate, whether countries nominate judges, and for which judges countries vote, requires more to be done than the other policies, particularly policies two and three. Attempting to do more typically requires more time and resources, for which the simulation does not account. Similarly, attempting to do more may cause reduced effectiveness across the base tasks, particularly if the resources expended are not increased sufficiently but instead stretched across the greater number of tasks. This probability of increased costs and decreased effectiveness further supports attempting policy two or three over policy six.

IV. The Biggest Determinants of Changes in Percentages: Which Variables Matter Most

The study examined the effect of changes in each variable to determine which had the biggest impact on the results. Outcomes are based on several variables, only two of which are explicit policy variables (the six influence policies and whether the United States joins the ICC). However, various policies may allow the United States to affect some of the other variables. If a change in a variable were to have a large impact, it may

be wise to attempt to affect that variable. For example, were it shown that an increase in U.S. power had a large positive effect, the United States may be able to alter the power it holds over other nations on this issue by conditioning aid on whether a nation acts in accord with U.S. wishes.

The variables may be split into two conceptual categories: core variables, which are those that are central to a nation's relationship with the court, and ancillary variables, which are those that affect how a nation acts toward the court. The core variables consist of the variables that capture a nation's ideal point and importance and the variable containing the different scenarios of other nations joining the court. Ancillary variables consist of amiability, U.S. power, and the variable that captures the extent of other nations' power and how and whether those nations attempt to influence the process.

Comparing the effect that changes in each variable has on the outcome measures within a given policy revealed that the ancillary variables had only small effects on the outcome but the core variables had more substantial effects. Of the core variables, only one seems to have some probability of being susceptible to U.S. attempts to alter it: other nations joining the court. How nations view the court and the importance they place on the issue is unlikely to be subject to alteration by the United States.

Of the scenarios capturing whether nations join the court, two are more plausible than the others: (1) ten neutral nations join the court, and (2) ten neutral nations and ten conservative nations join the court. Figure 8.13 displays histograms showing the effect of the above two scenarios. The values represent the drop in the percentage of panels that have a given probability of issuing a liberal ruling.

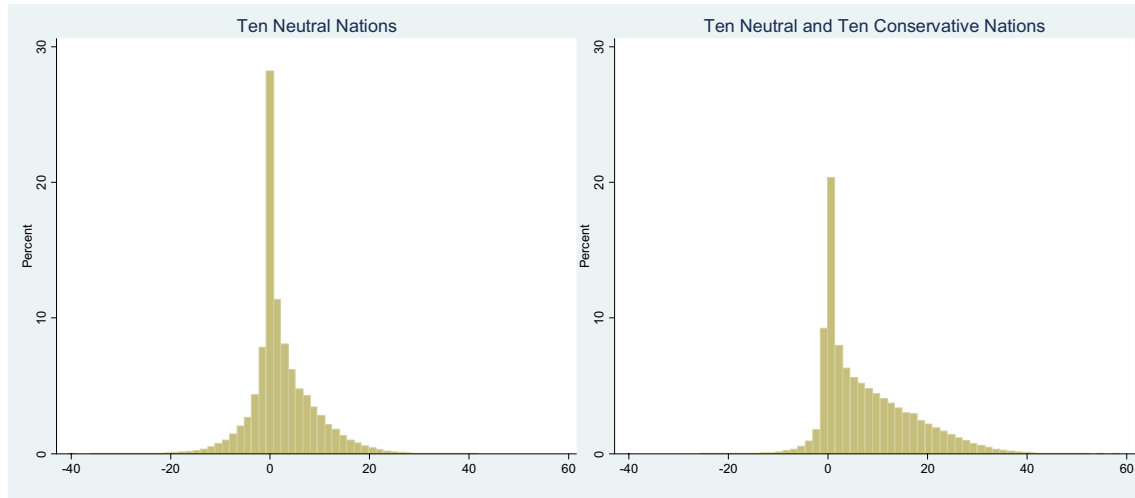


Figure 8.13:
Histograms of the Drop in the Percentage of Panels that Have a Given Probability of Issuing a Liberal Ruling in Different ICC-Join Scenarios

As above, the histograms tend to obscure the effect of the change in the variable, particularly the comparison of the left tail to the right tail. To further elucidate, Table 8.7 displays the values of the variables at various percentiles. Both scenarios perform well in that they reduce the percentage of panels with the given probability of issuing a liberal ruling. For the scenario in which only neutral nations join the court, in 25 percent of the possible situations, the percentage of panels reduces by at least 5 percent, in 10 percent of the possible situations, the percentage of panels reduces by at least 10 percent, and in 5 percent of the possible situations, the percentage drops by at least 14 percent. Conversely, only five percent of the panels increase the percentage by as much as 6.5 percent. The scenario in which neutral and conservative nations join the court performs even better and is far more robust. These results suggest that great gains in the reduction of risk can be achieved based on the nations that join the court.

Table 8.7:
Percentiles of the Relative Performance of Different Join Scenarios

| | 1% | 5% | 10% | 25% | 50% | 75% | 90% | 95% | 99% |
|----------------------------------|-------|------|------|------|-----|------|------|------|------|
| Neutral Nations | -12.9 | -6.5 | -3.6 | -0.4 | 0.8 | 5.0 | 10.5 | 14.0 | 21.0 |
| Neutral and conservative nations | -5.6 | -1.1 | -0.2 | 0.5 | 5.0 | 13.1 | 21.1 | 25.7 | 33.7 |

V. The Effect of the United States Joining the Court

The United States joining the ICC makes no difference in the percentage of panels that rule liberally across the vast majority of situations. This lack of any systematic effect can be viewed in Figure 8.14, which shows a histogram of the distribution of the increase in the percentage of panels that have a given probability of issuing a liberal ruling due to the United States remaining a non-Party to the ICC. For example, cases at the seventy-fifth percentile (midway up the right tail) show an increase by only 2.2 percentage points in the percent of panels that have a given probability of issuing a liberal ruling.

Two characteristics of the distribution indicate the lack of a systematic effect. One, and most important, the histogram's symmetry indicates that the instances in which the United States joining the ICC has a positive effect is matched by the instances in which it has a negative effect. These characteristics are also apparent in Table 8.8, which reports the increase in the percentage of panels that have a given probability of issuing a liberal ruling at various percentiles.

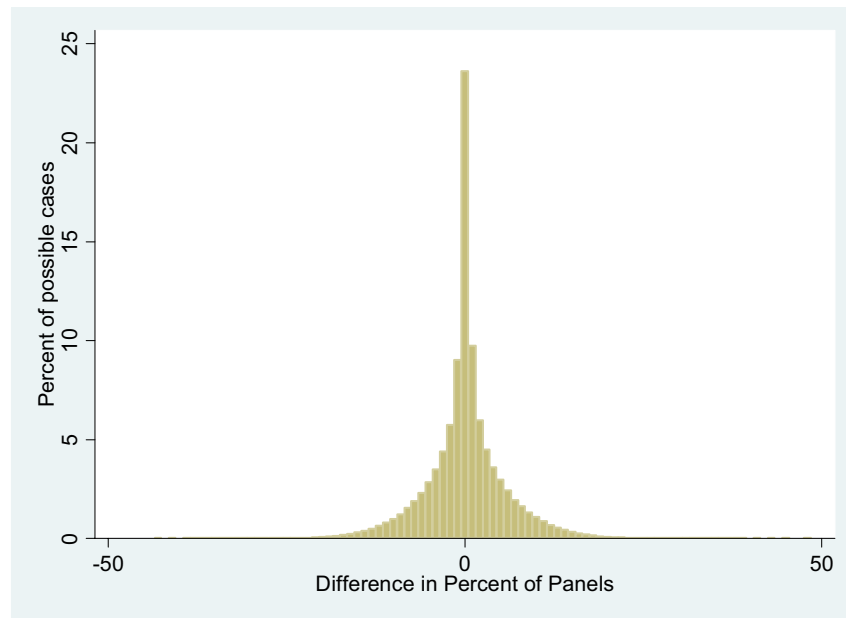


Figure 8.14:
Histogram of the Increase in the Percentage of Panels That
Have a Given Probability of Issuing a Liberal Ruling due to the
United States Remaining a Non-Party to the ICC

Table 8.8:
Percentiles of the Difference due to the U.S. Remaining a Non-Party to the ICC|

| | 1% | 5% | 10% | 25% | 50% | 75% | 90% | 95% | 99% | Avg |
|---|-------|------|------|------|-----|-----|-----|-----|------|-------|
| Additional percentage of panels with a given probability of issuing a liberal ruling if the U.S. is <u>not</u> on the ICC | -15.4 | -9.2 | -6.2 | -2.1 | 0.1 | 2.2 | 6.5 | 9.6 | 15.8 | 0.071 |

The second characteristic is that the effects are quite small, even approaching the tails. The average increase in the percentage of panels that issue a liberal ruling on liberal cases that results from the United States remaining outside the ICC is 0.071. That is, were the United States to join the ICC, on average, it would reduce by less than one-tenth of one percentage point the percent of panels that have a given probability of issuing a liberal ruling. In 80 percent of the cases, whether the U.S. is on the ICC changes the percentage of panels that issue a liberal ruling by less than 6.5 percent, and half the time it decreases the percentage. Likewise, in 90 percent of the cases, whether the U.S. is on the ICC changes the percentage of panels that issue a liberal ruling by less than 9.65 percent, and half the time it decreases the percentage. The cases in which changes were greater than 9.6 percent were systematically examined but they were uniformly distributed among the different values of the other variables. This result is expected, as the United States joining the court adds only one conservative vote and one potential nominee to the election process. Further qualitative analysis of the effects of the U.S. joining the court will be discussed in Chapter Nine.

VI. The Effect of Non-Random Panel Selection

Throughout this chapter, reference was made to the percentage of all possible three-judge panels that have different probabilities of issuing a liberal ruling. One of the measures used to determine the benefit of a policy was the degree to which it reduced those percentages. Looking at the percentage of all possible panels may imply that panel selection is random, but it is not. The ICC's Presidency selects the three-judge panels from the Pre-Trial Chamber and the Trial Chamber that will hear a matter. The Presidency consists of three of the Court's 18 judges, who hold the posts of President and

First and Second Vice President, and who are elected to these posts by a majority of the judges.⁵⁰⁸

Because the panels are not selected randomly, those who select the panels, the judges that make up the Presidency, could stack the panel for cases that are of greatest interest to the United States (those either involving a U.S. national or presenting the greatest opportunity for judicial policymaking). That is, they could purposely select a panel with a high probability of ruling in a manner unfavorable to the United States.

This section analyzes the effect of stacking panels by systematically examining outcomes in a specific scenario⁵⁰⁹ in which the United States does not attempt to influence the nominations and elections process, and comparing those outcomes to what occurs if the United States implements policy 3 (influencing whether a country nominates a judge and the type of judge it nominates). There are two ways for the court to stack a panel. The first is to game how the judges are divided into the three chambers—Pre-Trial, Trial, and Appeals—so that one chamber is composed of the judges most likely to rule in a manner unfavorable to the United States. Thus, every panel that emerges from that chamber would be stacked in a manner unfavorable to the United States. The second is to allow the judges' division into the three chambers to proceed as it normally would, but to stack an individual panel that will hear a matter so that the chosen panel is composed of the judges most likely to rule in a manner unfavorable to the United States.

The first method of stacking is unlikely to occur and may be counterproductive. First, the Rome Statute is vague on the precise manner by which the judges are divided into the separate chambers, but the division appears to be a collective effort of all the judges.⁵¹⁰ Stacking a particular chamber with judges of a certain ideology will be difficult with all the judges involved in the process. In addition, stacking one chamber with judges of a particular ideology will leave the other chambers more ideologically

⁵⁰⁸ Rome Statute, *supra* note 3, arts. 38(1), 38(3).

⁵⁰⁹ The scenario examined was that in which all variables maintain the status quo and the United States joins the ICC.

⁵¹⁰ The Rome Statute provides that after the judges are elected, the "Court organizes itself" into the three chambers. Rome Statute, *supra* note 3, arts. 39(1).

tilted in the other direction, which increases the probability that the other chambers will rule opposite to the manner desired from the gaming.

The second method—stack a panel that hears a particular case but not the chamber from which the panel is drawn—may be more feasible and more effective. Fewer judges are involved in panel selection than in the division into chambers, which may allow a panel to be stacked more easily than a chamber. The Rome Statute is also vague on the manner in which panels are selected, indicating only that it is the job of the Presidency. Unknown is whether it is a collective effort among the President and the First and Second Vice Presidents or whether the President alone has ultimate control. This creates some uncertainty in the ability to stack panels.

The foregoing discusses the ability to stack a panel, but whether a panel is to be stacked is also a function of the Presidency's willingness. One of the justifications the United States proffers for its stance regarding the ICC is the ability for the court to act politically. This has been heartily refuted by ICC proponents, who deny that the court could or would so act. Stacking panels to increase the probability of a certain ruling would confirm the fears and support the justifications of the United States, and undercut the arguments of ICC proponents, all of which may decrease support for the Court. Thus, if the Presidency is able to stack panels, it may not want to do so, or at least it may want to do so in a non-obvious manner, for example, by selecting a panel that has a high, but not the highest, probability of issuing the ruling it seeks.

To simulate the effects of stacking panels so that they are composed of judges more likely to rule in a manner unfavorable to the United States, six judges were randomly sampled from the 18 judges on the ICC in the chosen scenario in time period $t+6$. These six judges could be considered to constitute either the Pre-Trial or Trial Chamber.⁵¹¹ That the judges are randomly distributed into these chambers fits the second method of stacking panels discussed earlier, which seemed more feasible and effective than the other method. There are $C_{6,3}$ (which equals 20) possible three-judge panels from

⁵¹¹The Appeals Chamber consists of five judges, one of which must be the President, and the Pre-Trial and Trial Chambers each consist of no less than six judges (one will have six judges and one will have seven judges). *Id.*

this chamber. The probability that each of the 20 panels could issue a liberal ruling was calculated. Among these 20, the ten with the highest probability were selected and placed into a category labeled “Worst ten,” (the modifier “worst” is based on the perspective of the United States). Likewise, the five with the highest probability were selected and placed into a category labeled “Worst five.” These two separate categories represent different abilities and willingness to stack a panel. If the Presidency has great latitude and willingness to stack a panel, it could choose among the “Worst five” category. Reduced ability and willingness may result in the presidency selecting panels from the “Worst ten” category.

This process was repeated four times. Thus, five separate six-judge chambers were randomly selected from the 18 judges on the court, and the worst ten and worst five panels composed from each sample were categorized. This resulted in 50 panels in the worst ten category and 25 panels in the worst five category. Within each of these categories, measures were calculated identical to those used throughout this study. That is, the percentage of the “Worst ten” and the “Worst five” panels that have certain probabilities of issuing a liberal ruling were calculated.

Figure 8.15 shows the substantial effect stacking panels can have on the percentage of panels that issue a liberal ruling, even when a policy is implemented. Figure 8.15 is similar to previous graphs displayed earlier in this chapter (e.g., Figure 8.1) in that it displays the percentage of possible panels that have the probability given by the cut point on the horizontal axis of issuing a liberal ruling on a particular type of case. There are three differences, though, between Figure 8.15 and Figure 8.1. First, Figure 8.1 displays the conservative case (j-point = 125) but Figure 8.15 does not. This is because Figure 8.15 is examining the effect of stacking panels on the probability of a ruling that would be adverse to the United States (i.e. one that is against a U.S. national or otherwise progresses the law, which the liberal cases are meant to represent). Second, Figure 8.15 does not display the percentage of cases at the 90 percent cut point. That is because zero percent of every category of panels Figure 8.15 illustrates had a 90 percent probability of issuing a liberal ruling. The third and most substantive difference is that for each type of case (j-point = 625, 750, 875) there are four categories of cases graphed, one represented

by a solid bar, another by a striped bar, another by a speckled bar, and the final by a checkerboard bar.

For each type of case, the solid colored bar is the percentage of panels with the given probability of issuing a liberal ruling when no policy is attempted and the Presidency does not stack the panels.

The striped bar immediately to the right indicates the percentage of panels with the given probability of issuing a liberal ruling when policy 3 is attempted and the Presidency does not stack the panels. The difference in these bars indicates the reduction of risk due to the policy that occurs when the Presidency does not sack the panels. This portion of the graph is identical to that of Figure 8.2.

The speckled bar immediately to the right shows the percentage of panels with the given probability of issuing a liberal ruling when policy 3 is attempted and the Presidency stacks the panels by selecting among the worst ten panels. The increase in the percentage of panels from the striped bar to the speckled bar shows the negative effect of this type of stacking. In every instance except for those at the 75 cut point, the percentage of panels with the given probability of issuing a liberal ruling increases. The 75 cut point may diverge from the pattern because of the relatively small sample size and the small number of panels that achieve such a high probability of issuing a liberal ruling.

The checkerboard bar immediately to the right shows the percentage of panels with the given probability of issuing a liberal ruling when policy 3 is attempted and the Presidency stacks the panels by selecting among the worst five panels. In every instance except for those at the 75 cut point, the percentage of panels with the given probability of issuing a liberal ruling increases further and approaches or equals what would occur if there were no policy and also no gaming. This indicates that stacking panels can have as large a negative effect as the positive effect policy three has when no stacking occurs.

This does not indicate, however, that the benefits of the policy are wiped away by stacking. Figure 8.15 compares outcomes from no policy and no stacking to those from policy three and stacking. That is, Figure 8.15 does not control for stacking but allows it to vary with the policy. A better evaluation of the effect of the policy accounting for stacking is to compare outcomes from no policy to those from policy three while

controlling for stacking (accounting for stacking under both no policy and policy three). These comparisons are illustrated in Figure 8.16.

Like Figure 8.15, Figure 8.16 displays four categories for each type of case. The solid bar illustrates the percentage of panels with the given probability of issuing a liberal ruling when no policy is attempted and the Presidency stacks the panels by selecting among the worst ten panels. The striped bar immediately to the right illustrates percentage of panels with the given probability of issuing a liberal ruling under the same method of stacking when policy three is attempted. The reduction from the colored bar to the striped bar indicates the reduction of risk that occurs because of the policy under the worst ten method of stacking.

Likewise the speckled bar and the checkerboard bar indicate the percentage of panels when no policy is attempted verses when policy three is attempted, respectively. In both categories, the Presidency stacks the panels by selecting among the worst five panels. The reduction from the speckled bar to the checkerboard bar indicates the reduction of risk that occurs from the policy under the worst five method of stacking. Again, one anomalous result appears at the 75 cut point.

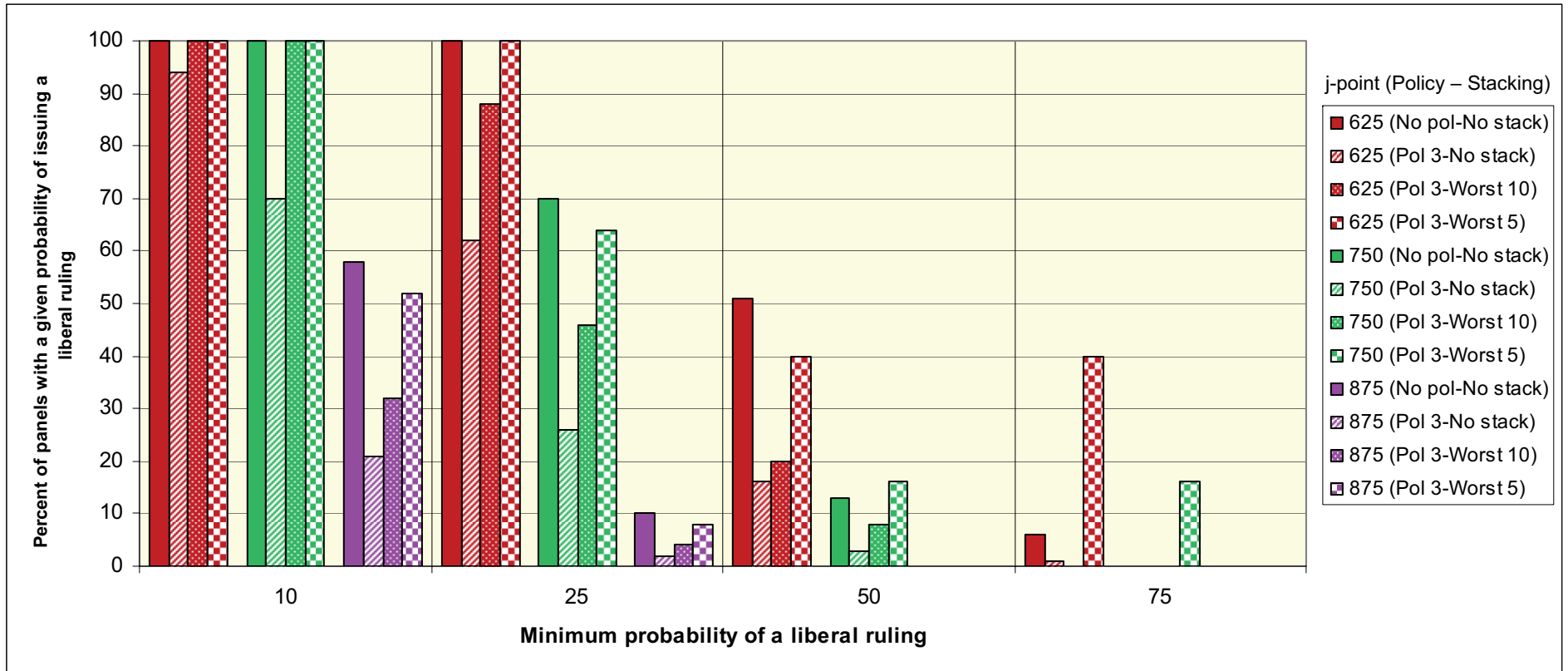


Figure 8.15:
Comparison of the Effects of No Stacking to Stacking

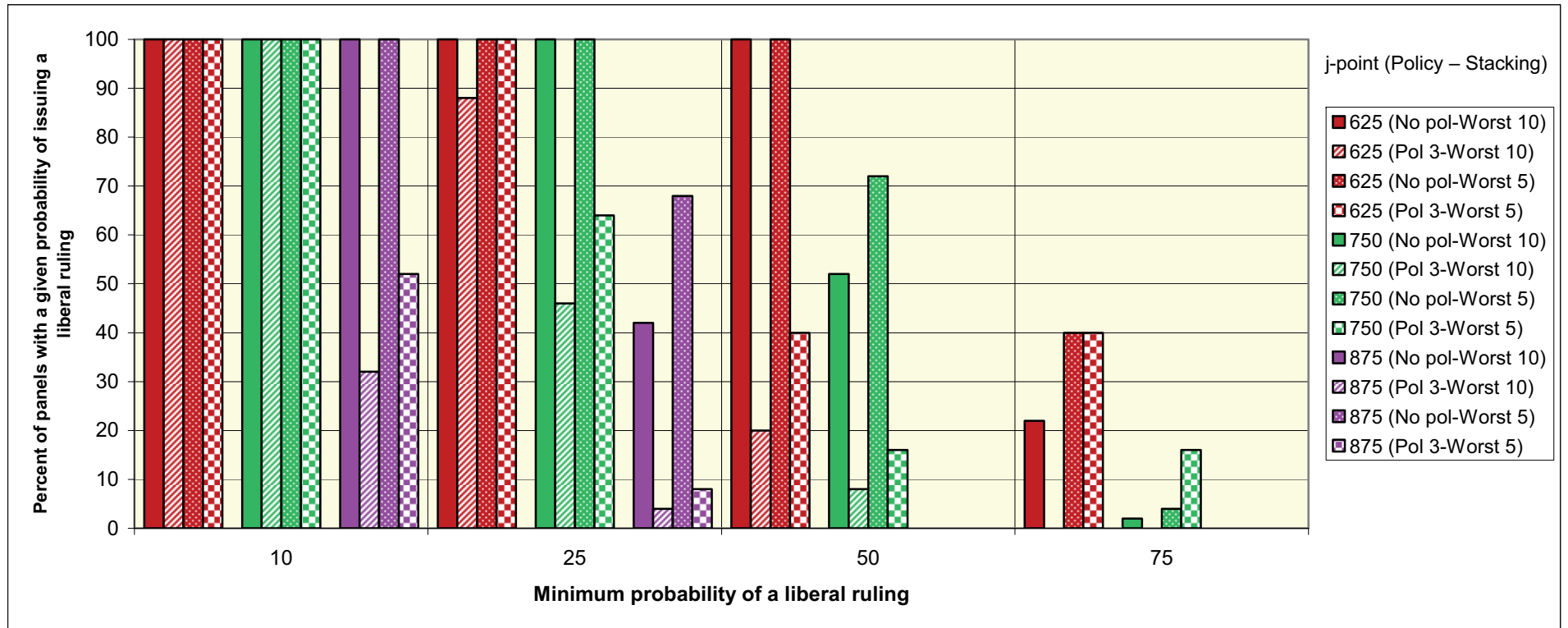


Figure 8.16:
The Benefits of Influence Attempts Accounting for Stacking

These reductions in risk due to the policy—indicated by the reduction from the solid to the striped bar and from the speckled to the checkerboard bar—range from small to quite substantial. Many reductions are even greater than that which occurs between no policy and policy three with no stacking, depicted by the difference between the solid and striped bars in Figure 8.15. These reductions indicate that even were the court to attempt to stack cases, the policies discussed earlier in the chapter would reduce the probability of the court issuing rulings adverse to the United States.

Figure 8.16 assumes that the Presidency's ability and willingness to stack is independent of the policy the U.S. attempts. It seems, though, that the ability and willingness of the Presidency to stack is a function of court composition, which is a function of U.S. policy. The judges that constitute the Presidency (the President and the First and Second Vice-Presidents) are elected to those roles by a majority of the judges. Successful U.S. attempts to affect the composition of the court may also reduce the likelihood that the judges will elect to the Presidency the types of judges that would attempt to stack panels so as to achieve rulings adverse to the United States. Thus, the policies discussed earlier in the chapter have two effects here. One, as Figure 8.16 indicates, they may reduce the probability of adverse rulings to the United States, even if the Presidency stacks the panels. Two, they may reduce the ability and willingness of the Presidency to stack the panels.

VII. The Effect of the Policies on the Conservative Case

It has been repeated throughout this paper that the United States has two goals with respect to the ICC: enable it to take the cases and make the rulings it should while preventing it from taking the cases and making the rulings it should not. The extent to which the ICC rules liberal on the conservative case (j-point equals 125) helps assess that first goal. From the above discussion, it appears that policies two and three are the most advantageous in their effect and robustness in reducing risk. Table 8.9 illustrates their effect on the United States' other goal, ensuring the court is able to prosecute and punish those it should. The table displays the effect each policy has on the percentage of panels that rule liberally with the probability given by the cut point.

Table 8.9:
Percentiles of the Effect of Policies Two, Three, and Six on the Conservative Case

| Cut point | 1% | 5% | 10% | 25% | 50% | 75% | 90% | 95% | 99% | Mean |
|-----------|-------|-------|-------|-------|-------|------|------|-----|------|-------|
| Policy 2 | | | | | | | | | | |
| 10 | 0.0 | 0.0 | 0.0 | 0.0 | 0.0 | 0.0 | 0.0 | 0.0 | 0.0 | 0.0 |
| 25 | 0.0 | 0.0 | 0.0 | 0.0 | 0.0 | 0.0 | 0.0 | 0.0 | 0.0 | 0.0 |
| 50 | -7.7 | -4.0 | -2.5 | -0.5 | 0.0 | 0.1 | 1.7 | 3.0 | 6.3 | -0.2 |
| 75 | -29.4 | -18.7 | -13.5 | -6.4 | -1.8 | -0.3 | 0.3 | 2.2 | 10.0 | -4.2 |
| 90 | -49.2 | -36.4 | -29.4 | -19.7 | -10.4 | -3.9 | 0.4 | 3.9 | 11.5 | -12.6 |
| Policy 3 | | | | | | | | | | |
| 10 | 0.0 | 0.0 | 0.0 | 0.0 | 0.0 | 0.0 | 0.0 | 0.0 | 0.0 | 0.0 |
| 25 | 0.0 | 0.0 | 0.0 | 0.0 | 0.0 | 0.0 | 0.0 | 0.0 | 0.0 | 0.0 |
| 50 | -7.9 | -4.4 | -2.8 | -0.7 | 0.0 | 0.1 | 1.6 | 2.9 | 6.0 | -0.3 |
| 75 | -31.7 | -20.1 | -14.5 | -6.7 | -1.8 | -0.3 | 0.2 | 1.6 | 8.7 | -4.6 |
| 90 | -50.4 | -36.8 | -29.8 | -19.7 | -10.5 | -4.0 | -0.1 | 2.8 | 9.9 | -12.9 |

Neither policy affects the percentage of panels that have a 10 percent or 25 percent probability of issuing a liberal ruling. With or without the United States attempting to influence the process every panel has at least a 25 percent chance of issuing a liberal ruling. The effect on the percentage of panels that have at least a 50 percent chance of issuing a liberal ruling is very slight. The average is a less than 0.3 percentage point reduction and in less than 1 percent of the situations the reduction in the percentage of panels exceeds 7.9 percent. The effects are more substantial as the probability increases. There are greater reductions in the percentage of panels that rule liberally with a 75 percent probability. Still though, even at this high probability, the average reduction in the percentage of panels is less than 5 percent and in only ten percent of the cases, does the reduction exceed 14.5 percent of the panels. There are significant reductions in the percentage of panels for which issuing a liberal ruling on this case is more certain, at least 90 percent.

This reduction is the cost of the reduction in risk, and it is a tradeoff that none of the strategies considered here can avoid. However, even with these reductions, there remains a high percentage of panels that rule liberally at every cut point, including 75 and 90. Figure 8.17 graphs the average percentage of panels that issue a liberal ruling verse the cut point. Even after the drop, on average almost 60 percent of panels will rule liberally with a probability of at least 90 percent. Figure 8.18 graphs the average percent of panels that issue a liberal ruling when no policy is in place and compares it to the percent of panels that issue a liberal ruling under policies two and three at the tenth percentile, deep in the left tail. Even considering only the lowest decile of the percentage

of panels that issue a liberal ruling, almost 30 percent of the panels have at least a 90 percent probability of issuing a liberal ruling and almost 70 percent of the panels have at least a 75 percent probability of issuing a liberal ruling. These figures help assuage concerns that the policies the United States may implement could substantially hinder the court's ability to fulfill its core purpose.

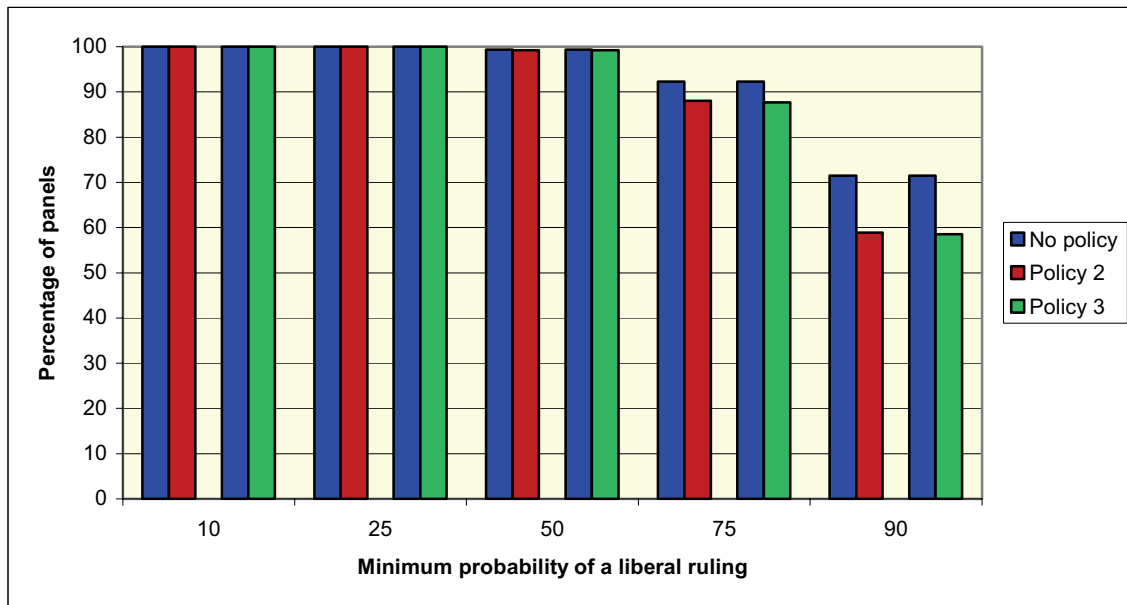


Figure 8.17:
Average Percent of Panels that Issue a Liberal Ruling on the Conservative Case

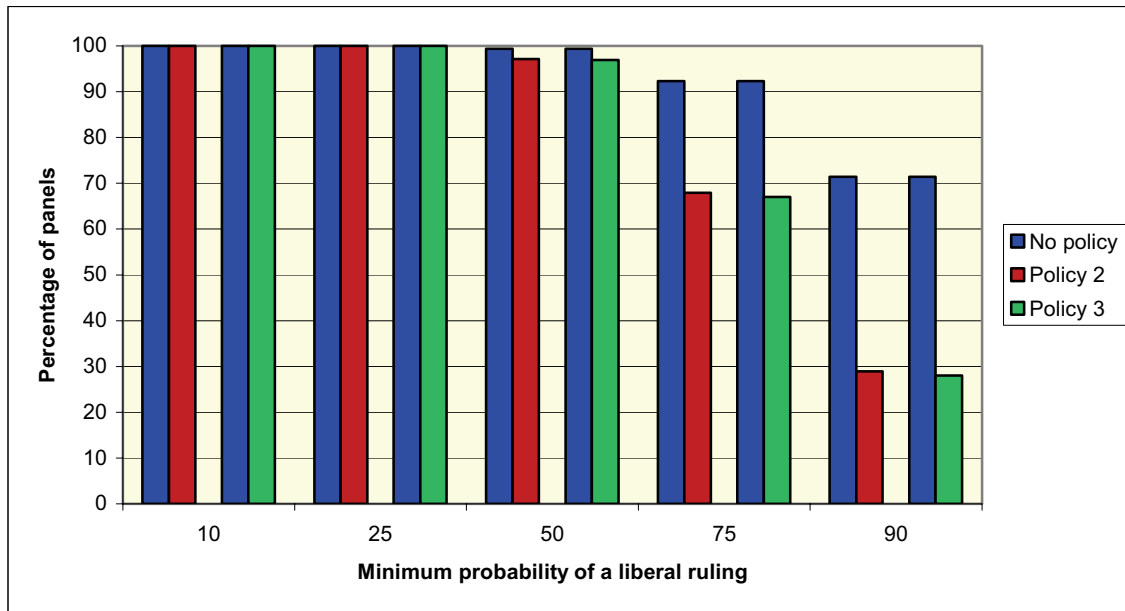


Figure 8.18:
The Percent of Panels that Issue a Liberal Ruling
in the Lowest Decile on the Conservative Case

VIII. Summary

This section described the simulation results, which suggest that policy two—influencing what type of judges countries nominate—and policy three—influencing what type of judges countries nominate and whether a country nominates a judge—perform at least as well as other policies and are more robust across a range of scenarios than other policies. The analysis further suggests that variation in the core variables—those representing how nations view the court and which nations are party to the court—most determine outcomes. The results also suggest that whether the United States becomes a party to the court made little difference in the final analysis. Finally, the analysis suggests that U.S. attempts to minimize the risk it faces from the court diminishes the court’s ability to fulfill its core purpose only slightly.

CHAPTER NINE: POLICY RECOMMENDATIONS AND CONCLUSIONS

Previous Chapters detail the risk the ICC may pose to U.S. nationals and U.S. military operations through improper prosecutions, created a quantitative framework for evaluating how various policies and other factors affect that risk, and discussed the results from the modeling exercises. Based on the forgoing, this Chapter issues policy recommendations and discusses areas for further research.

I. Policy Recommendations

- **Recommendation One: Influence What Type of Judges a Nation Nominates**

The modeling exercise endeavored to find policies robust to changing circumstances and uncertainties. The results discussed in Chapter Eight suggest that attempting to influence the types of judges countries nominate and whether a nation nominates a judge is most favored in terms of its effect in reducing the percentage of panels with given probabilities of issuing an adverse ruling. Policies that include influencing votes add little if anything to the benefits of the nominations policies, and, when attempted independent of the nominations process, they may be counterproductive. This could be because influencing votes causes some votes to shift from more moderate judges to more conservative judges, but not enough votes shift to the conservative judges for them to be elected. Moreover, had the votes not shifted from the moderate judges, they would have been elected. The result is that more liberal judges are elected than would have been had the votes not shifted from moderate to conservative judges. Finally, policies attempting to influence both the nominations and elections process were not robust to (1) the possibility that too much engagement in the process could have negative effects and (2) the inability of the United States to punish or reward votes, which are secret.

- **Recommendation Two: Encourage Other Nations to Join the ICC**

The modeling results suggest that great gains in reduction of risk may be had through neutral and conservative nations joining the ICC. Although the membership of the ICC was not originally conceived of as a policy variable, the United States may be able to affect this by encouraging nations to join the ICC. There appear to be 20 nations

not on the ICC that have rather neutral views about the court and do not view the issue with great importance. Generally, these nations do not have the ability to project military power, have not been militarily active, and were not among the nations championing the creation of the ICC. If some of those nations join the court, their participation in the nominations and elections process, as influenced by the United States, would result in modest gains in the reduction of risk. Given that these nations do not place a lot of importance on the issue, it may be possible to convince them, perhaps with proper inducement, to join the court.

There appear to be 65 nations that have a conservative view of the court that are not members of the ICC. The results in Chapter Eight suggest that substantial gains in reduction of risk may be had from merely ten of these nations joining the court. This, though, may be difficult, as these nations are generally opposed to the court and generally view the issue with some importance. Still, the possibly should be explored, particularly if these nations can be convinced that some of their concerns may be assuaged through the membership of themselves and other like-minded nations.

This policy has an important tradeoff that may counteract some of its gains in reduction of risk. If more nations join the ICC, it expands the collective territory of nations that are party to the ICC. Recall from Chapter Two that territory is one of the bases upon which the court may take jurisdiction of the nationals of non-State Parties. Increasing the number of State Parties may increase the ability for the court to take jurisdiction of U.S. nationals. In addition, State Parties of the ICC are treaty bound to cooperate with the court. An increase in the nations who are so obliged may also increase risk.

The membership of different nations would impact this tradeoff differently. Nations in which there is little probability of the United States operating or with which the United States does not conduct military operations may have no impact on the risk to the United States. This highlights the importance of being selective about which nations the United States would approach to join the court. It also marks a stark contrast in the U.S. approach to the court, which has been to distance itself from the court and convince others to do the same.

Another tradeoff is the potential of a negative reaction from liberal countries. Those countries may view U.S. attempts here as an effort to co-opt the court. However, there is little opportunity for them to retaliate in kind by influencing other liberal countries to join the court—Tables 7.7 and 7.8 reveal that there are few liberal countries that are not already on the court.

Finally, the United States may not have much success encouraging other nations to join the court if the United States remains a non-Party. Whether the United States should join the ICC is discussed below in Recommendation Six.

- **Recommendation Three: Stop Cutting Aid to Countries that do not Sign Article-98 Agreements**

Through the American Servicemembers Protection Act (ASPA) and the Nethercutt amendment, the United States conditions military aid and a form of economic aid on whether nations sign Article-98 agreements. With the exceptions of NATO members and other strong, historical or critical allies, those countries that do not sign agreements lose aid. Chapter Two discussed how this policy yields few benefits, primarily because the agreements may not be enforceable. If the ICC rules that they are not enforceable and orders a nation that has signed an agreement to cooperate with the court, that nation must decide whether to accede to the demands of the court or the United States. This is the same situation the nation would be in had it never signed an Article-98 agreement. Moreover, as discussed above, the risk posed by the relationship between a nation and the ICC depends on the particular nation involved. Simply put, the potential cooperation of a country and the ICC matters more to the United States for some countries than others. The broad brush approach of the ASPA and the Nethercutt Amendment fails to account for this.

In addition, the conditioning of aid on signing Article-98 agreements has had political and practical unintended consequences. The policy has caused significant enmity among several nations.⁵¹² Moreover, the withdrawal of military assistance has caused a void in nations of general strategic importance to the United States and of

⁵¹² Juan Forero, *Bush's Aid Cuts on Court Issue Roil Neighbors*, N.Y. TIMES, August 18, 2005.

specific importance for certain U.S. policies such as counter-narcotic efforts. Other nations, such as China, are beginning to fill that void.⁵¹³ General Bantz J. Craddock, the commander of U.S. Southern Command (SOUTHCOM) testified before Congress that, “We now risk losing contact and interoperability with a generation of military classmates in many nations of the region, including several leading countries.”⁵¹⁴ During that testimony, given in March of 2005, General Craddock warned that China was seeking to cultivate the connections the United States had abandoned.⁵¹⁵ In testimony before Congress a year later, Craddock told the Senate Armed Services Committee that those efforts are now bearing fruit. China is increasing its role in the region and foreign military personnel who would have come to the United States to train but for the ASPA are now going to China.

The costs that flow from the ASPA and the Nethercutt amendment may be bearable if they produced tangible benefits, but their benefits are at best speculative and at worst illusory. The United States should repeal the provisions of the ASPA and the Nethercutt Amendment that condition aid on whether a country signs an Article-98 agreement.

- **Recommendation Four: Condition Aid on Other Actions More Directly Linked to Reducing Risk**

Instead of conditioning the withdrawal of aid on whether a nation refuses to make a commitment to do some act, the United States should condition the withdrawal of aid on the acts themselves. The provisions of the ASPA and Nethercutt amendment discussed above may be replaced with provisions that condition the withdrawal of aid on a country’s tangible cooperation with the ICC that increases the risk to the United States. For example, the withdrawal of aid could be conditioned on whether a nation surrenders U.S. nationals to the court, surrenders U.S. classified information to the court, allows access to witnesses or evidence, or otherwise cooperates with the court in a case involving U.S. nationals.

⁵¹³ Bill Gertz, *Chinese Military Trains West*, WASH. TIMES, March 15, 2006; Forero, *supra* note 512.

⁵¹⁴ Forero, *supra* note 512.

⁵¹⁵ *Id.*

Similarly, the United States could condition aid or its withdrawal on the types of judges countries nominate. As discussed in Chapter Two, the risk the court poses depends entirely on the rulings judges issues, which depends largely on the types of judges that occupy the court. Thus, the actions of states in the nominations and elections process, in which every ICC State Party participates, has a tangible effect on the risk the ICC may pose to the United States. It would seem, then, more advantageous to condition aid or its withdrawal on these actions than on a promise to take a future action (not surrender U.S. nationals to the ICC) that, for the vast majority of nations, may never be implicated.

It may be difficult to develop a workable test or set of conditions that aids in determining whether a nation has engaged in the nominations process, such as by nominating a judge whose ideal point is close to that of the United States, in a manner acceptable to the United States such that it warrants the continuation of aid. In addition, such a policy would likely come with great controversy. Nonetheless, efforts to do develop a workable set of conditions should begin.

- **Recommendation Five: Encourage Court Processes that Make it Difficult to Stack Panels**

The section entitled “The Effect of Non-Random Panel Selection” in Chapter Eight discusses the negative effect of the Presidency purposely stacking a three-judge panel to increase the risk of a ruling adverse to the United States. Depending on the ability and willingness of the Presidency to stack a panel, the negative effects of stacking can be substantial. This suggests that a significant reduction in risk can be obtained by reducing or eliminating the Presidency’s ability or willingness to stack a panel.

As the section discussed, successful efforts to affect the judges on the court, who vote for which judges make up the Presidency, may decrease the possibility of stacking. Nonetheless, the possibility of stacking could be reduced more greatly through policies that directly relate to panel selection. For example, the possibility of panel stacking would be eliminated if judges were required to be randomly selected for panels. The possibility of panel stacking could be reduced, albeit not eliminated, if judges were selected for panels based on clear, transparent rules for panel selection.

The United States has no ability to independently implement these policies; they must be enacted by the Assembly of State Parties. Therefore, the United States should encourage ICC State Parties to propose and vote for policies that mandate either randomized or precise rules for panel selection

- **Recommendation Six: Do not Join the ICC**

Whether the United States should join the ICC is the subject of great political debate. This study does not focus on the issue; however, the analysis conducted herein does provide some guidance. First, the results from Chapter Eight reveal that there would be little tangible benefit to the U.S. if the United States joined the court. By joining the ICC, the United States gains an official voice and an official vote on matters that affect the risk the court could pose, such as the election of judges and the definition of the crime of aggression. However, one vote among over 100 votes has little effect, which was reflected in the simulation results.

It could be argued that other tangible benefits would result from joining the court. For example, attitudes toward the United States might soften. In the framework of the model, this translates to increased amiability. However, an increase in amiability, *ceteris paribus*, had little effect on the percentage of panels that had some given probability of voting liberally.

There is some possibility that the United States joining the court could produce tangible benefits. If it were the case that the United States could convince a group of nations with conservative and moderate ideal points to join the court, in accord with Recommendation Two discussed above, but that those other countries conditioned their membership on U.S. membership, the United States joining the court could have a measurable benefit. Indeed, the United States might have little success convincing other states to join the court if it remains outside it.

Even assuming the above benefits would result from joining the court, it is speculative whether those benefits would exceed the costs. By joining the court, the United States would open itself to the court taking jurisdiction over any action conducted by a U.S. national. If the United States remains a non-Party, the court may only have jurisdiction of U.S. nationals for acts conducted on the territory of a non-State Party or a

non-State Party that requests the court take jurisdiction over the matter. The tradeoff then is that, assuming joining the court produces the benefits discussed above, the United States is able to reduce the probability that the court rules in a manner unfavorable to the United States on any given case, but increases the ability for the court to initiate cases against U.S. nationals. Absent assurances that the speculative associated benefits of joining the court would transpire, doing so is not worth the real costs that could follow.

II. Areas for Further Research

This study is a first attempt at quantitatively assessing the risk the ICC poses to the United States and U.S. nationals and the factors upon which that risk depends. As the court's lifespan lengthens and its operations increase, the uncertainty surrounding many aspects of the court will diminish. This knowledge would allow the model to be refined, which would increase its utility. For example, were the United States to attempt to influence ICC nominations, it would learn more about the success of those efforts and the factors that affect success.

Similarly, as judges issue rulings, more will be learned about the validity of the analogy to the U.S. Supreme Court, upon which the results are partly dependent, and whether ICC judges are as independent as it appears they are. Along those lines, further study may reveal levers of influence that the United States may be able to pull to reduce risk.

Finally, more refined models on the effect of influence and diplomacy generally may be developed and applied to this issue. Specifically, using a veridical model would permit more extensive use of the results, as opposed to merely aiding in the understanding of the relative effects of the various factors.

APPENDIX A: COUNTRIES' ICC, ARTICLE-98 AGREEMENT, AND AID STATUSES

The following table shows whether each UN country (except the United States) has signed the Rome Statute, is a State-Party to the ICC, signed an Article-98 agreement with the United States, taken whatever action the state requires to so that the Article-98 agreement has entered into force, an Article-98 agreement, or lost aid as a result of not signing an Article-98 agreement.

| Country | Signed the Rome Statute | State-Party | Signed Art-98 Agmt | Art-98 Agmt in Force | Publicly Rejected Art-98 Agmt | Lost Aid |
|----------------------|-------------------------|-------------|--------------------|----------------------|-------------------------------|----------|
| Afghanistan | X | X | X | X | | |
| Albania | X | X | X | X | | |
| Algeria | X | | X | X | | |
| Andorra | X | X | | | | |
| Angola | X | | X | X | | |
| Antigua and Barbuda | X | X | X | X | | |
| Argentina | X | X | | | X | |
| Armenia | X | | | | | |
| Australia | X | X | | | | |
| Austria | X | X | | | X | |
| Azerbaijan | | | X | | | |
| Bahamas | X | | | | | |
| Bahrain | X | | X | | | |
| Bangladesh | X | | X | | | |
| Barbados | X | X | | | X | X |
| Belarus | | | | | | |
| Belgium | X | X | | | X | |
| Belize | X | X | X | | | |
| Benin | X | X | X | X | | |
| Bhutan | | | X | X | | |
| Bolivia | X | X | X | X | | |
| Bosnia/Herzegovina | X | X | X | X | | |
| Botswana | X | X | X | X | | |
| Brazil | X | X | | | X | X |
| Brunei Darussalam | | | X | | | |
| Bulgaria | X | X | | | X | |
| Burkina Faso | X | X | X | | | |
| Burundi | X | X | X | | | |
| Cambodia | X | X | X | X | | |
| Cameroon | X | | X | X | | |
| Canada | X | X | | | X | |
| Cape Verde | X | | X | X | | |
| Central African Rep. | X | X | X | | | |
| Chad | X | | X | | | |
| Chile | X | | | | | |
| China | | | | | | |
| Colombia | X | X | X | X | | |
| Comoros | X | | X | X | | |
| Congo | X | X | X | | | |
| Costa Rica | X | X | | | X | |
| Cote d'Ivoire | X | | X | | | |
| Croatia | X | X | | | | X |
| Cuba | | | | | | |
| Cyprus | X | X | | | X | |

| Country | Signed the Rome Statute | State-Party | Signed Art-98 Agmt | Art-98 Agmt in Force | Publicly Rejected Art-98 Agmt | Lost Aid |
|--------------------|-------------------------|-------------|--------------------|----------------------|-------------------------------|----------|
| Czech Republic | X | | | | | |
| Dem. Rep. Of Congo | X | X | X | X | | |
| Denmark | X | X | | | X | |
| Djibouti | X | X | X | | | |
| Dominica | X | X | X | | | |
| Dominican Republic | X | X | X | | | |
| DPRK | | | | | | |
| Ecuador | X | X | | | X | X |
| Egypt | X | | X | X | | |
| El Salvador | | | X | X | | |
| Equatorial Guinea | | | X | X | | |
| Eritrea | X | | X | | | |
| Estonia | X | X | | | | |
| Ethiopia | | | X | | | |
| Fiji | X | X | X | | | |
| Finland | X | X | | | | |
| France | X | X | | | X | |
| Gabon | X | X | X | | | |
| Gambia | X | X | X | X | | |
| Georgia | X | X | X | X | | |
| Germany | X | X | | | X | |
| Ghana | X | X | X | X | | |
| Greece | X | X | | | X | |
| Grenada | | | X | X | | |
| Guatemala | | | | | | |
| Guinea | X | X | X | | | |
| Guinea-Bissau | X | | | | | |
| Guyana | X | X | X | X | | |
| Haiti | X | | X | | | |
| Honduras | X | X | X | X | | |
| Hungary | X | X | | | | |
| Iceland | X | X | | | X | |
| India | | | X | X | | |
| Indonesia | | | | | | |
| Iran | X | | | | | |
| Iraq | | | | | | |
| Ireland | X | X | | | X | |
| Israel | | | X | X | | |
| Italy | X | X | | | X | |
| Jamaica | X | | | | | |
| Japan | | | | | | |
| Jordan | X | X | X | X | | |
| Kazakhstan | | | X | X | | |
| Kenya | X | X | | | X | |
| Kiribati | | | X | X | | |
| Kuwait | X | | X | | | |
| Kyrgyzstan | X | | X | | | |
| Laos | | | X | | | |
| Latvia | X | X | | | | |
| Lebanon | | | | | | |
| Lesotho | X | X | | | X | X |
| Liberia | X | X | X | | | |

| Country | Signed the Rome Statute | State-Party | Signed Art-98 Agmt | Art-98 Agmt in Force | Publicly Rejected Art-98 Agmt | Lost Aid |
|-----------------------|-------------------------|-------------|--------------------|----------------------|-------------------------------|----------|
| Libya | | | | | | |
| Liechtenstein | X | X | | | X | |
| Lithuania | X | X | | | | |
| Luxembourg | X | X | | | X | |
| Madagascar | X | | X | | | |
| Malawi | X | X | X | X | | |
| Malaysia | | | | | | |
| Maldives | | | X | | | |
| Mali | X | X | | | X | X |
| Malta | X | X | | | X | X |
| Marshall Is. | X | X | X | | | |
| Mauritania | | | X | X | | |
| Mauritius | X | X | X | | | |
| Mexico | X | X | | | X | |
| Micronesia | | | X | | | |
| Monaco | X | | | | | |
| Mongolia | X | X | X | | | |
| Morocco | X | | X | | | |
| Mozambique | X | | X | X | | |
| Myanmar (Burma) | | | | | | |
| Namibia | X | X | | | X | X |
| Nauru | X | X | X | | | |
| Nepal | | | X | | | |
| Netherlands | X | X | | | X | |
| New Zealand | X | X | | | X | |
| Nicaragua | | | X | X | | |
| Niger | X | X | | | X | X |
| Nigeria | X | X | X | X | | |
| Norway | X | X | | | X | |
| Oman | X | | X | X | | |
| Pakistan | | | X | | | |
| Palau | | | X | | | |
| Panama | X | X | X | X | | |
| Papua New Guinea | | | X | | | |
| Paraguay | X | X | | | X | X |
| Peru | X | X | | | X | X |
| Philippines | X | | X | X | | |
| Poland | X | X | | | | |
| Portugal | X | X | | | X | |
| Qatar | | | | | | |
| Republic of Korea | X | X | | | | |
| Republic of Moldova | X | | | | | |
| Romania | X | X | X | | | |
| Russia* | X | | | X | | |
| Rwanda | | | X | | | |
| Saint Kitts and Nevis | | | | | | |
| Saint Lucia | X | | | | X | X |
| Saint Vincent/Gren. | X | X | | | X | |
| Samoa | X | X | | | X | X |
| San Marino | X | X | | | | |
| Sao Tome and Principe | X | | X | X | | |
| Saudi Arabia | | | | | | |

| Country | Signed the Rome Statute | State-Party | Signed Art-98 Agmt | Art-98 Agmt in Force | Publicly Rejected Art-98 Agmt | Lost Aid |
|----------------------|-------------------------|-------------|--------------------|----------------------|-------------------------------|----------|
| Senegal | X | X | X | | | |
| Serbia/Montenegro | X | X | | | X | X |
| Seychelles | X | | X | | | |
| Sierra Leone | X | X | X | X | | |
| Singapore | | | X | X | | |
| Slovak Republic | X | X | | | | |
| Slovenia | X | X | | | | |
| Solomon Islands | X | | X | | | |
| Somalia | | | | | | |
| South Africa | X | X | | | X | X |
| Spain | X | X | | | X | |
| Sri Lanka | | | X | | | |
| Sudan | X | | | | | |
| Suriname | | | X | | | |
| Swaziland | | | | | | |
| Sweden | X | X | | | X | |
| Switzerland | X | X | | | X | |
| Syria | X | | | | | |
| Tajikistan | X | X | X | X | | |
| TFYR Macedonia | X | X | X | X | | |
| Thailand | X | | X | | | |
| Timor-Leste | X | X | X | X | | |
| Togo | | | X | | | |
| Tonga | | | X | | | |
| Trinidad and Tobago | X | X | | | X | X |
| Tunisia | | | X | X | | |
| Turkey | | | | | | |
| Turkmenistan | | | X | X | | |
| Tuvalu | | | X | | | |
| Uganda | X | X | X | X | | |
| Ukraine | X | | | | | |
| United Arab Emirates | X | | X | X | | |
| United Kingdom | X | X | X | X | | |
| UR Tanzania | X | X | | | X | X |
| Uruguay | X | X | | | X | X |
| Uzbekistan | X | | X | | | |
| Vanuatu | | | | | | |
| Venezuela | X | X | | | X | |
| Vietnam | | | | | | |
| Yemen | X | | X | X | | |
| Zambia | X | X | X | | | |
| Zimbabwe | X | | | | | |

APPENDIX B: THE ROME STATUTE'S CRIMINAL PROVISIONS

This Appendix displays Articles 6, 7, and 8 of the Rome Statute, which contain the substantive criminal provisions over which the ICC has jurisdiction.

Article 6 Genocide

For the purpose of this Statute, "genocide" means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) Imposing measures intended to prevent births within the group;
- (e) Forcibly transferring children of the group to another group.

Article 7 Crimes against humanity

1. For the purpose of this Statute, "crime against humanity" means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:

- (a) Murder;
- (b) Extermination;
- (c) Enslavement;
- (d) Deportation or forcible transfer of population;
- (e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;
- (f) Torture;
- (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;

- (h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court;
 - (i) Enforced disappearance of persons;
 - (j) The crime of apartheid;
 - (k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.
2. For the purpose of paragraph 1:
- (a) "Attack directed against any civilian population" means a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack;
 - (b) "Extermination" includes the intentional infliction of conditions of life, inter alia the deprivation of access to food and medicine, calculated to bring about the destruction of part of a population;
 - (c) "Enslavement" means the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children;
 - (d) "Deportation or forcible transfer of population" means forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law;
 - (e) "Torture" means the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions;
 - (f) "Forced pregnancy" means the unlawful confinement of a woman forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law. This definition shall not in any way be interpreted as affecting national laws relating to pregnancy;
 - (g) "Persecution" means the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity;

(h) "The crime of apartheid" means inhumane acts of a character similar to those referred to in paragraph 1, committed in the context of an institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups and committed with the intention of maintaining that regime;

(i) "Enforced disappearance of persons" means the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time.

3. For the purpose of this Statute, it is understood that the term "gender" refers to the two sexes, male and female, within the context of society. The term "gender" does not indicate any meaning different from the above.

Article 8 War crimes

1. The Court shall have jurisdiction in respect of war crimes in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes.

2. For the purpose of this Statute, "war crimes" means:

(a) Grave breaches of the Geneva Conventions of 12 August 1949, namely, any of the following acts against persons or property protected under the provisions of the relevant Geneva Convention:

- (i) Wilful killing;
- (ii) Torture or inhuman treatment, including biological experiments;
- (iii) Wilfully causing great suffering, or serious injury to body or health;
- (iv) Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;
- (v) Compelling a prisoner of war or other protected person to serve in the forces of a hostile Power;
- (vi) Wilfully depriving a prisoner of war or other protected person of the rights of fair and regular trial;
- (vii) Unlawful deportation or transfer or unlawful confinement;

(viii) Taking of hostages.

(b) Other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, namely, any of the following acts:

(i) Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;

(ii) Intentionally directing attacks against civilian objects, that is, objects which are not military objectives;

(iii) Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict;

(iv) Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated;

(v) Attacking or bombarding, by whatever means, towns, villages, dwellings or buildings which are undefended and which are not military objectives;

(vi) Killing or wounding a combatant who, having laid down his arms or having no longer means of defence, has surrendered at discretion;

(vii) Making improper use of a flag of truce, of the flag or of the military insignia and uniform of the enemy or of the United Nations, as well as of the distinctive emblems of the Geneva Conventions, resulting in death or serious personal injury;

(viii) The transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory;

(ix) Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives;

(x) Subjecting persons who are in the power of an adverse party to physical mutilation or to medical or scientific experiments of any kind

which are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his or her interest, and which cause death to or seriously endanger the health of such person or persons;

(xi) Killing or wounding treacherously individuals belonging to the hostile nation or army;

(xii) Declaring that no quarter will be given;

(xiii) Destroying or seizing the enemy's property unless such destruction or seizure be imperatively demanded by the necessities of war;

(xiv) Declaring abolished, suspended or inadmissible in a court of law the rights and actions of the nationals of the hostile party;

(xv) Compelling the nationals of the hostile party to take part in the operations of war directed against their own country, even if they were in the belligerent's service before the commencement of the war;

(xvi) Pillaging a town or place, even when taken by assault;

(xvii) Employing poison or poisoned weapons;

(xviii) Employing asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices;

(xix) Employing bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions;

(xx) Employing weapons, projectiles and material and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering or which are inherently indiscriminate in violation of the international law of armed conflict, provided that such weapons, projectiles and material and methods of warfare are the subject of a comprehensive prohibition and are included in an annex to this Statute, by an amendment in accordance with the relevant provisions set forth in articles 121 and 123;

(xxi) Committing outrages upon personal dignity, in particular humiliating and degrading treatment;

(xxii) Committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in article 7, paragraph 2 (f), enforced sterilization, or any other form of sexual violence also constituting a grave breach of the Geneva Conventions;

(xxiii) Utilizing the presence of a civilian or other protected person to render certain points, areas or military forces immune from military operations;

(xxiv) Intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law;

(xxv) Intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including wilfully impeding relief supplies as provided for under the Geneva Conventions;

(xxvi) Conscripting or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities.

(c) In the case of an armed conflict not of an international character, serious violations of article 3 common to the four Geneva Conventions of 12 August 1949, namely, any of the following acts committed against persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention or any other cause:

(i) Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;

(ii) Committing outrages upon personal dignity, in particular humiliating and degrading treatment;

(iii) Taking of hostages;

(iv) The passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all judicial guarantees which are generally recognized as indispensable.

(d) Paragraph 2 (c) applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature.

(e) Other serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law, namely, any of the following acts:

(i) Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;

- (ii) Intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law;
 - (iii) Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict;
 - (iv) Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives;
 - (v) Pillaging a town or place, even when taken by assault;
 - (vi) Committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in article 7, paragraph 2 (f), enforced sterilization, and any other form of sexual violence also constituting a serious violation of article 3 common to the four Geneva Conventions;
 - (vii) Conscripting or enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities;
 - (viii) Ordering the displacement of the civilian population for reasons related to the conflict, unless the security of the civilians involved or imperative military reasons so demand;
 - (ix) Killing or wounding treacherously a combatant adversary;
 - (x) Declaring that no quarter will be given;
 - (xi) Subjecting persons who are in the power of another party to the conflict to physical mutilation or to medical or scientific experiments of any kind which are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his or her interest, and which cause death to or seriously endanger the health of such person or persons;
 - (xii) Destroying or seizing the property of an adversary unless such destruction or seizure be imperatively demanded by the necessities of the conflict;
- (f) Paragraph 2 (e) applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature. It

applies to armed conflicts that take place in the territory of a State when there is protracted armed conflict between governmental authorities and organized armed groups or between such groups.

3. Nothing in paragraph 2 (c) and (e) shall affect the responsibility of a Government to maintain or re-establish law and order in the State or to defend the unity and territorial integrity of the State, by all legitimate means.

APPENDIX C: COEFFICIENT ESTIMATES TABLES FROM CHAPTER SIX

This Appendix displays tables of coefficients that correspond to the tables of marginal effects estimates presented in Chapter Six. They are titled to easily identify the corresponding table. For example, the coefficient estimate version of Table 6.3 is titled Table C6.3.

Table C6.3:
Coefficient Estimates of Simple Logit Regression Results on Micro-Data

| | Unweighted | | | Unweighted (Unanimous cases dropped) | | | Weighted | | |
|------------------|--------------------|--------------------|--------------------|---|--------------------|--------------------|--------------------|--------------------|--------------------|
| | (1) Votes | (2) Votes | (3) Votes | (1) Votes | (2) Votes | (3) Votes | (1) Votes | (2) Votes | (3) Votes |
| genview | 0.932 (71.86)** | | 0.954 (13.84)** | 1.38 (76.22)** | | 1.597 (17.25)** | 1.455 (81.60)** | | 1.973 (19.45)** |
| spview | | 1.298 (44.88)** | 0.587 (10.11)** | | 1.815 (44.88)** | 0.664 (8.75)** | | 2.027 (45.08)** | 0.667 (8.37)** |
| Constant | 0.102 (12.05)** | 0.117 (4.59)** | 0.183 (6.99)** | -0.067 (5.91)** | -0.101 (2.94)** | 0.032 -0.87 | -0.036 (3.15)** | -0.064 (1.69) | 0.14 (3.38)** |
| Observations | 61873 | 8527 | 8527 | 37851 | 5999 | 5999 | 37850 | 5541 | 5541 |
| Pseudo R-squared | 0.07 | 0.21 | 0.22 | 0.13 | 0.35 | 0.38 | 0.15 | 0.41 | 0.46 |

Absolute value of z statistics in parentheses

* significant at 5%; ** significant at 1%

Table C6.5:
Coefficient Estimates of Logits Using *litkn* on Micro-Data

| | Unweighted | | Weighted | |
|-------------------------|--------------------|---------------------|--------------------|---------------------|
| | (1) Votes | (2) Votes | (1) Votes | (2) Votes |
| genview | 0.932 (71.86)** | 0.97 (72.92)** | 1.455 (81.60)** | 1.574 (83.31)** |
| litkn | | -0.057 (3.10)** | | -0.113 (4.15)** |
| gen_litkn | | -1.115 (15.84)** | | -2.499 (28.02)** |
| Constant | 0.102 (12.05)** | 0.118 (11.67)** | -0.036 (3.15)** | -0.078 (5.61)** |
| Observations | 61873 | 61873 | 37850 | 37850 |
| Pseudo R-squared | 0.07 | 0.07 | 0.15 | 0.17 |
| Chi-2 test: | | | | |
| genview + gen_litkn = 0 | | | | |
| Prob > Chi-2 | | | | |

Absolute value of z statistics in parentheses

* significant at 5%; ** significant at 1%

Table C6.7:
Coefficient Estimates of Logits Using Saliency on Micro-Data

| | Unweighted | | Weighted | |
|------------------|--------------------|--------------------|--------------------|--------------------|
| | (1) | (2) | (1) | (2) |
| | Votes | Votes | Votes | Votes |
| genview | 0.932 (71.86)** | 0.87 (63.83)** | 1.455 (81.60)** | 1.397 (73.10)** |
| sal | | 0.174 (6.47)** | | -0.133 (3.93)** |
| gv_sal | | 0.496 (11.40)** | | 0.43 (8.01)** |
| Constant | 0.102 (12.05)** | 0.078 (8.72)** | -0.036 (3.15)** | -0.021 (1.65) |
| Observations | 61873 | 61873 | 37850 | 37850 |
| Pseudo R-squared | 0.07 | 0.07 | 0.15 | 0.16 |

Absolute value of z statistics in parentheses

* significant at 5%; ** significant at 1%

Table C6.8:
Coefficient Estimates of Logit Results of Final Model

| | Votes |
|------------------|--------------------|
| genview | 0.15 (2.56)* |
| gv_pactpap | 0.296 (5.84)** |
| gv_judge | 0.103 (2.32)* |
| gv_wsp | 1.206 (26.70)** |
| sal | -0.119 (3.47)** |
| gv_sal | 0.545 (9.80)** |
| Constant | -0.012 (0.94) |
| Observations | 37846 |
| Pseudo R-squared | 0.17 |

Absolute value of z statistics in parentheses

* significant at 5%; ** significant at 1%

APPENDIX D: ADDITIONAL GRAPHS FROM CHAPTER EIGHT

This Appendix contains additional figures to which Chapter Eight refers and that are related to the figures contained therein. The figures are titled to easily identify the corresponding graph. For example, the graph that is related to Figure 8.2 is titled Figure D8.2.

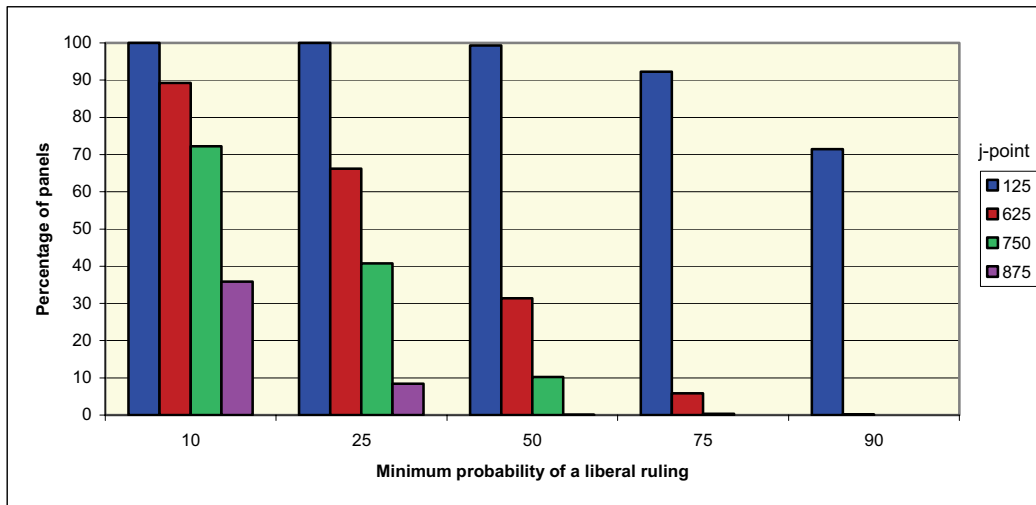


Figure D8.1:
Percentage of Panels with the Given Probability of Issuing a Liberal Ruling
(Three-Judge Panels)

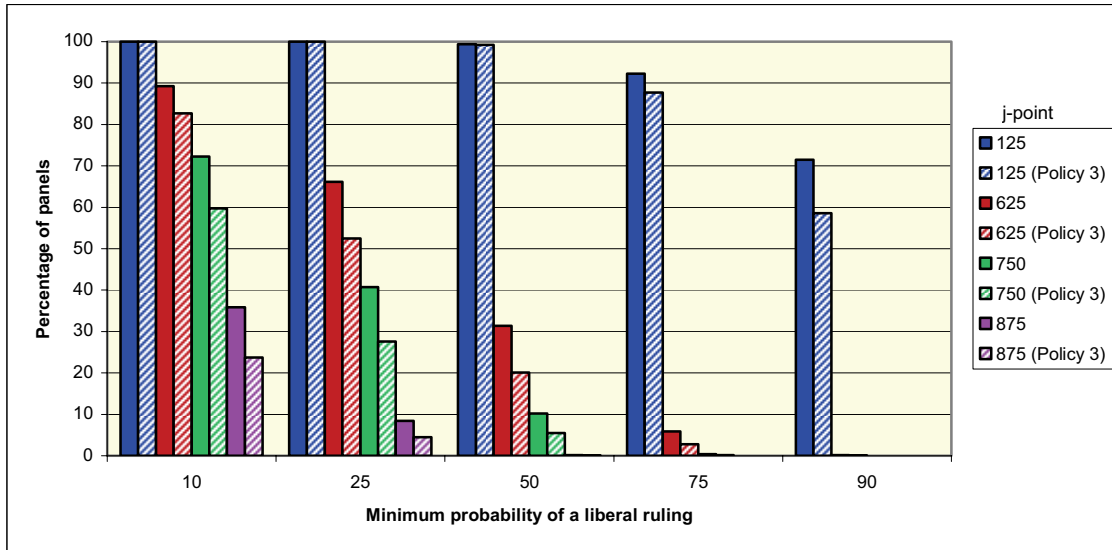


Figure D8.2:
Percentage of Panels with the Given Probability of Issuing a Liberal Ruling
for the Nominee and Nomination Policy versus the Status Quo
(Three-Judge Panels)

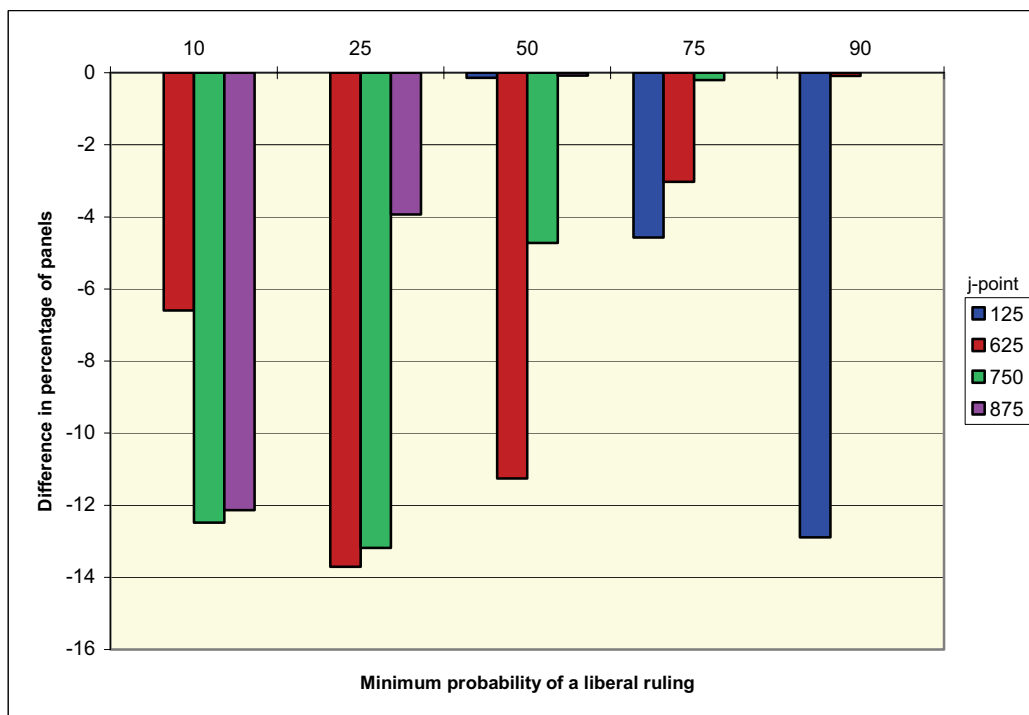


Figure D8.3:
Difference in the Percentage of Panels with the Given Probability of Issuing a
Liberal Ruling Between the Nominee and Nomination Policy and the Status Quo

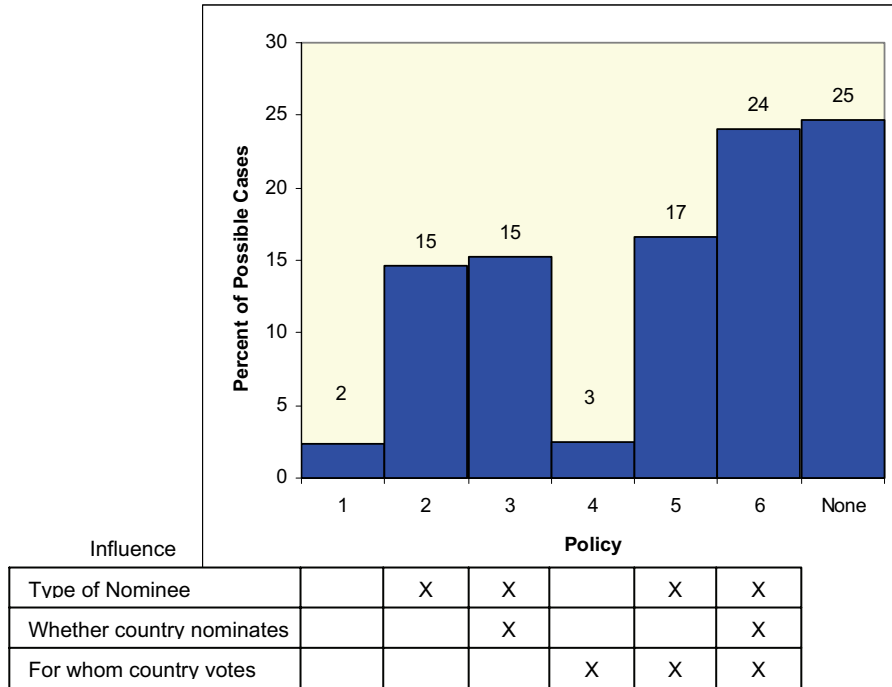


Figure D8.6:
Percent of All Possible Cases in which Each Policy is Best

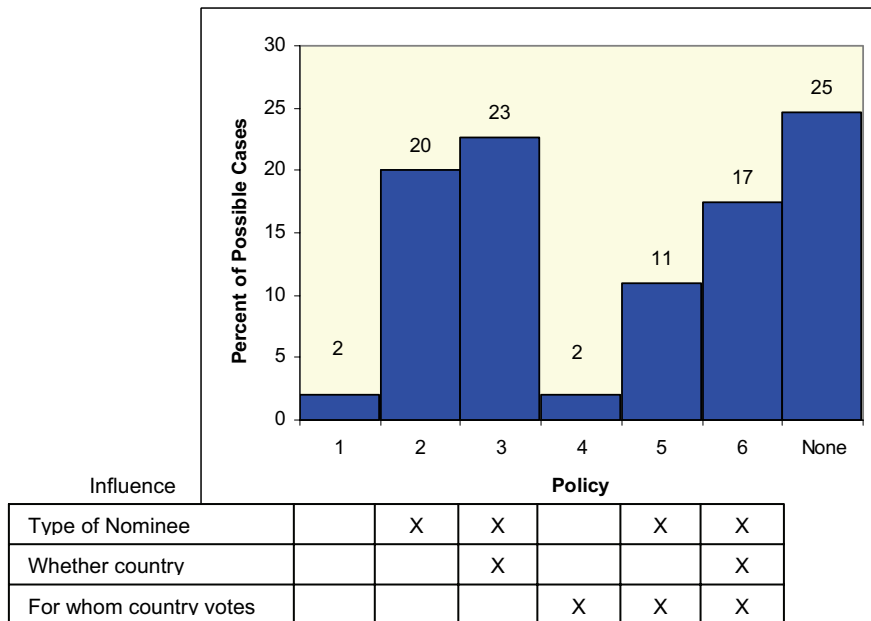


Figure D8.10:
Percent of All Possible Cases in which Each Policy is Best
Accounting for Blowback and the Probability of Cheating